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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 614

CHRIS LARSEN, PETITIONER,

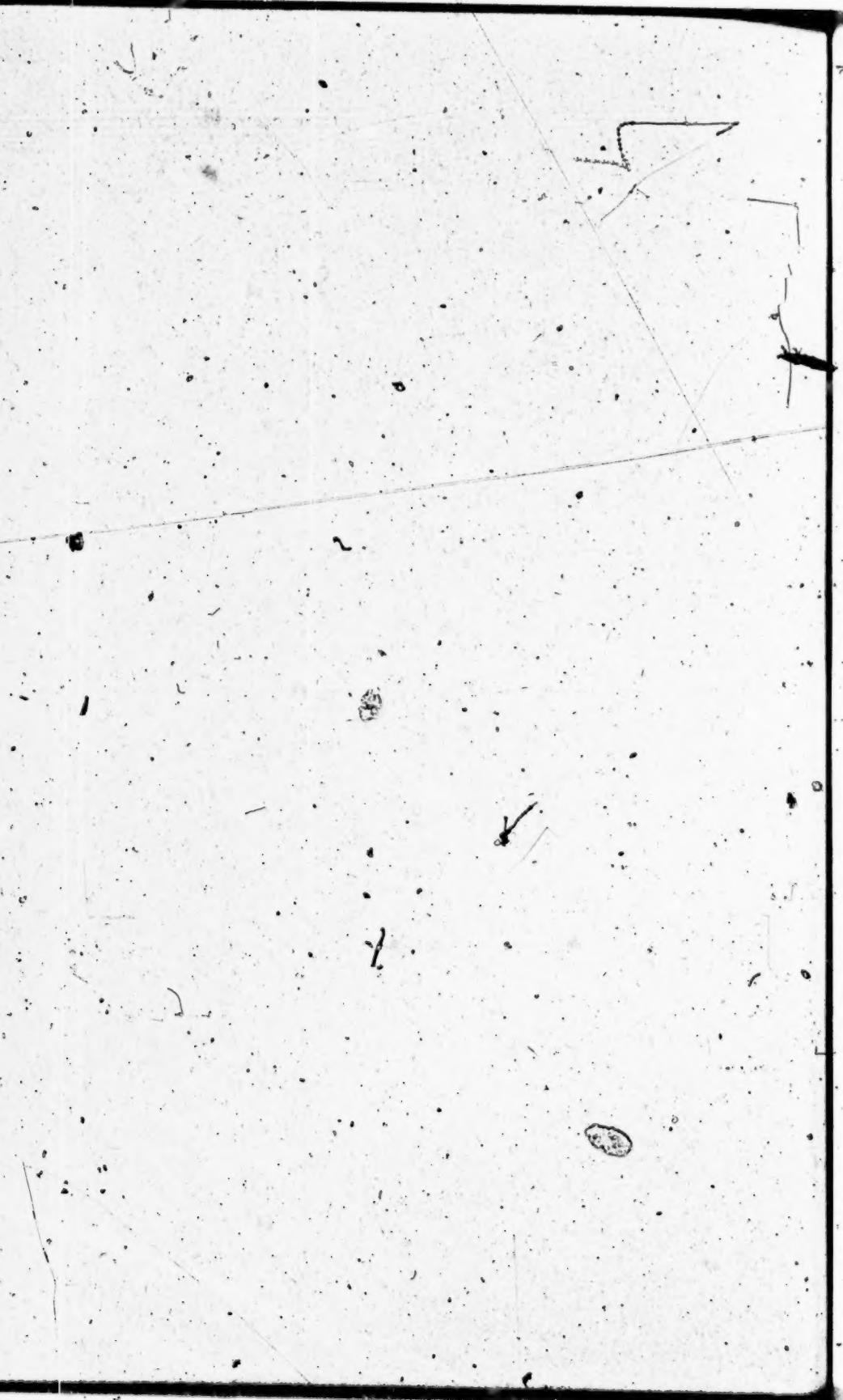
vs.

NORTHLAND TRANSPORTATION COMPANY, CHARTERER OF THE AMERICAN MOTOR VESSEL "NORCO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 1, 1933

CERTIORARI GRANTED JANUARY 8, 1934.



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NAMES AND ADDRESSES OF PROCTORS.

MESSRS. BOGLE, BOGLE & GATES,
609-24 Central Building, Seattle, Washington.
Proctors for Appellant.

MESSRS. VANDERVEER & BASSETT,
511 Alaska Building, Seattle, Washington.
Proctor for Appellee. [1]*

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 13,301

In the Matter of the Petition of

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel NORCO for LIMITATION OF LIABILITY.

STATEMENT.

The petition for limitation of liability was filed on October 1, 1932, and therewith affidavits of value, and on said date an order for ad interim stipulation was entered and an ad interim stipulation filed and approved, and on said date an order directing issuance of monition, returnable on November

*Page numbering appearing at the foot of page of original certified Transcript of Record.

10, 1932, was entered, and monition and citation were issued accordingly and due service thereof had as provided in said order.

On October 7, 1932, the appellee Chris Larsen filed exceptions to the petition for limitation of liability and a demurrer and motion to dismiss the same, together with the affidavit of G. F. Vanderveer in support of said motion, to which there was attached certified copies of all pleadings filed in the state court, which said exceptions, demurrer and motion to dismiss were argued on November 7, 1932, and the court's memorandum opinion sustaining the motion to dismiss was filed on November 22, 1932, and order of dismissal entered on December 5, 1932, from which said order of dismissal this appeal is taken."

BOGLE, BOGLE & GATES,
Proctors for Appellant.
VANDERVEER & BASSETT,
Proctors for Appellee.

[Endorsed]: Filed Dec. 15, 1932. [2]

[Title of Court and Cause.]

PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Judges of the Above Entitled Court:

The petition of Northland Transportation Co., a corporation, charterer of the American Motor

Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, and appurtenances, in a cause of limitation of liability, civil and maritime, alleges as follows:

I.

That petitioner, Northland Transportation Co., is now, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business in Seattle, State of Washington, and is now, and was at all times herein mentioned, the charterer and operator of the American Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture and appurtenances, and manned, victualed and navigated said vessel at its own expense, of which said vessel The Citizens Light, Power & Water Co., a corporation, is now and at all times herein mentioned was the owner. [3]

II.

That heretofore and on or about the 20th day of July, 1931, said vessel commenced loading at the port of Seattle for a voyage to the port of Juneau, Alaska, and thereafter sailed on said voyage which terminated at said port of Juneau on the 25th day of July, 1931, being the voyage in connection with which your petitioner seeks limitation of liability herein.

III.

That Chris Larsen was a seaman employed as a member of the crew of said vessel on said voyage and on the 20th day of July, 1931, while said vessel was loading at the port of Seattle, said Chris Larsen while engaged in loading said vessel as a member of the crew of said vessel, suffered personal injuries thereon resulting in the institution of an action by the said Chris Larsen, through his attorneys, Vanderveer & Bassett, Alaska Building, Seattle, State of Washington, against your petitioner in the Superior Court of the State of Washington for King County, being cause No. 247091 of the files of said court, in which said action recovery in the sum of $25,000 was sought by reason of the alleged negligence of the winchdriver on said vessel going ahead with great speed on the winches, causing a strongback which had become attached to board slings which were being moved to strike said Chris Larsen and throw him through an open hatchway to the 'tween deck. That in said action a verdict of a jury was rendered on the 27th day of September, 1932, in favor of said Chris Larsen and against your petitioner in the sum of $12,500, and a judgment entered thereon on the 1st day of October, 1932, in the sum of $12,500, interest and costs, which said judgment remains wholly unsatisfied. [4]

IV.

That said judgment and claim of Chris Larsen exceeds the value of the interest of your petitioner

as charterer in said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, at the termination of said voyage, together with all freights and passenger monies pending on said voyage. That the total freight and passenger monies pending on said voyage amounted to the sum of Three Thousand Eight Hundred Fifty-six and no/100 ($3856.00) Dollars, which, together with the value of the interest of your petitioner as charterer in said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, at the termination of said voyage, did not exceed the sum or value of Four Thousand Six Hundred Fifty-one and 98/100 ($4651.98) Dollars.

V.

That at the time of the commencement of loading said vessel as aforesaid, and at the time of the accident and injury to said Chris Larsen, and at all times thereafter, during said voyage, the said vessel was staunch and seaworthy and was well and sufficiently supplied, manned, equipped, and all of her engines, boilers, boats, machinery, tackle, apparel, furniture and appurtenances were adequate and sufficient and free from defects, and the aforesaid injury, loss and damage to said Chris Larsen, and any and all other injuries, losses, destructions and damages, whether of or to life or persons or property, or goods, wares or merchandise, done, occasioned or incurred upon the voyage of said vessel

aforesaid, were done, occasioned or incurred, if at all, without the consent, or privity, or knowledge, or design, or neglect of your petitioner, or any of its [5] directors, officers, agents, or servants, and your petitioner requests leave to contest its liability therefor.

VI.

While not admitting liability therefor and reserving the right to contest the same, if any, your petitioner desires to limit its liability for each and every of the aforesaid injuries, losses and damages, sustained by said Chris Larsen, and for all other injuries, losses, destructions, and damages, whether of or to life or persons or property, or goods, wares or merchandise, done, occasioned or incurred upon the voyage of said vessel aforesaid, and in that behalf petitioner does hereby claim the benefit of the limitation of liability provided for in Sections 4282 to 4289 inclusive, of the Revised Statutes of the United States, and any and all acts amendatory thereof or supplemental thereto.

VII.

Petitioner claims that it is entitled to have its liability in the premises, if any, limited to the value of its interest, as charterer, in the Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same existed at the port of Juneau, Alaska, on the 25th day of July, 1931, at the end of the voyage aforesaid, and the freight and

passenger monies pending for said voyage, and in that behalf petitioner is now ready, able and willing, and hereby offers to give its stipulation or stipulations with sufficient surety, conditioned for the payment into this Court by petitioner of petitioner's interest as charterer in and to said Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same existed at the port of Juneau, Alaska, on the 25th day of July, 1931, at the [6] time and place where the voyage aforesaid terminated, together with the freight and passenger monies pending for said voyage, with interest thereon, said payment to be made whenever the same shall be ordered by this Court.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, your petitioner prays that this Honorable Court order due appraisement to be made of the amount or value of petitioner's interest as charterer in the Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same were at the termination of the voyage upon which the accident to Chris Larsen occurred as hereinbefore described, to-wit at the port of Juneau, Alaska, on the 25th day of July, 1931, and due appraisement of petitioner's interest in the

amount of freight and passenger monies pending for said voyage; that this Honorable Court do make an order for the payment by said petitioner of said appraised values into court, or the giving of a stipulation or stipulations by said petitioner as security for the payment thereof into court, according to the value of petitioner's interest, whenever the same shall be ordered, with interest thereon at the rate of 6% per annum from the date of said stipulation; that this Honorable Court will, on the filing of said stipulation, or pending appraisement, of an ad interim stipulation by said petitioner, issue or cause to be issued a monition against all persons, firms, or corporations claiming damages against petitioner by reason of any loss, damage, [7] destruction or injury, whether of or to life or persons, or property done, incurred, occasioned or arising on the voyage, or in connection therewith aforesaid, citing them and each of them to appear before this Honorable Court, or a Commissioner to be appointed by this Court, and there make due proof of their respective claims, and also appear and answer under oath all and singular the matters aforesaid, at or before the time to be designated in said writ, according to the law and rules and practices of this Honorable Court, and that this Honorable Court also enjoin, or otherwise restrain, the prosecution of any and all suit or suits, action or actions, libel or libels, or legal proceedings in any manner or description whatsoever, including execution under the judgment obtained by said Chris Larsen as aforesaid,

except in the present proceedings, in respect to any injuries, losses, destructions and damages, and any and all claims occurring, or arising upon, or in connection with the voyage aforesaid. That this Honorable Court do adjudge that petitioner is not liable to any extent for any such injury, loss, destruction and damage, or for any act, matter or thing done, occasioned or incurred upon the aforesaid voyage of said Motor Vessel NORCO, but if, or in the event this Honorable Court should adjudge that your petitioner is liable to any extent therefor, that such liability be limited to the amount or value of petitioner's interest as charterer in the said Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same were at the termination of the voyage aforesaid, to-wit at the port of Juneau, Alaska, on the 25th day of July, 1931, and the freight and passenger monies pending for said voyage, all as hereinbefore in this petition set forth, [8] and that such value may be determined by the appraisement of said interest as hereinbefore prayed, and that in the event of petitioner being held liable, the money paid or secured to be paid into Court, as aforesaid, be divided and pro rated among the several claimants against petitioner in proportion to the amount of their respective claims duly approved and confirmed, saving to all parties any priority to which they may be legally entitled and that petitioner may

have such other and further relief as may be deemed meet and just in the premises.

BOGLE, BOGLE & GATES,
Proctors for Petitioner. [9]

[Endorsed]: Filed Oct. 1, 1932. [10]

[Title of Court and Cause.]

ORDER DIRECTING ISSUANCE OF MONITION.

It appearing to this Court that a petition was filed herein on the 1st day of October, 1932, by the Northland Transportation Co., a corporation, charterer of the Motor Vessel "NORCO" for limitation of its liability against any and all claims arising out of or in connection with injuries, losses, destructions or damages sustained on board said vessel upon a voyage commencing at the Port of Seattle, Washington, and termination at the Port of Juneau, Alaska, on the 25th day of July, 1931, and particularly in connection with injuries or damages sustained on board said vessel on or about July 20, 1931, in the harbor of the Port of Seattle, Washington, and it further appearing that said petitioner claims the benefits of exemptions from all liability provided by Sections 4282 to 4289 inclusive, of the Revised Statutes of the United

States, and any and all acts amendatory thereof or supplemental thereto, and that said petitioner desires to contest any and all liability for any and all injury, loss, destruction and damage arising from or in connection with the aforesaid voyage of said Motor Vessel "NORCO", and it further appearing that a certain action for damages designated as Cause No. 247091 has been commenced against petitioner herein, in the Superior Court of the State of Washington for King County, by Chris Larsen, claiming damages in the sum of $25,000.00, by reason of an injury alleged to have been [11] sustained on board said vessel on or about July 20, 1931, on said voyage, on which said cause of action judgment has been entered in the sum of $12,500.00, with interest and costs, and it further appearing that on the 1st day of October, 1932, said petitioner, pursuant to order heretofore entered herein, filed an ad interim stipulation in due form in the sum of $7,500.00, with interest from the date of said stipulation, and it further appearing that by reason of the aforesaid facts a monition should issue in this cause as provided by law, and the court being fully advised in the premises, now therefore, it is hereby

ORDERED, that a monition issue out of this court to and against all persons, corporations, associations, firms, partnerships and their representatives, claiming injury, loss, destruction or damage of whatsoever kind or nature, either to person or property incurred or arising on July 20, 1931, and/

or upon or in connection with the said voyage of the said vessel, terminating at Juneau, Alaska, on the 25th day of July, 1931, citing them to appear before this court and answer said petition and make due proof of their respective claims on or before the 10th day of November, 1932.

It is FURTHER ORDERED that notice of issuance of this monition be given by the United States Marshal by causing copies thereof to be posted in three public places in the City of Seattle, State of Washington, and that further notice of the issuance of said Monition be given by the said United States Marshal by causing a citation setting forth the substance of said Monition to be published in a daily newspaper published in the City of Seattle, State of Washington, daily except Sunday, for fourteen days, thereafter once a week until the return date of said Monition, the date of the first publication to be not less than thirty days prior to such return day. [12]

It is FURTHER ORDERED that a copy of said Monition and of this order be served at least thirty days before said return day of said Monition, upon the said Chris Larsen, by delivering to and leaving the same with either of his attorneys of record, to-wit: George F. Vanderveer or Samuel B. Bassett; and it is further

ORDERED that the further prosecution of the above mentioned action heretofore commenced by the said Chris Larsen against said petitioner in the

Superior Court of the State of Washington for King County, being Cause No. 247091 of the files of said Court, and/or the issuance of execution on the judgment obtained therein and/or the commencement and prosecution of any other suit, action or libel by the said Chris Larsen, involving, embracing or arising out of the said alleged injury and damage set forth in the above mentioned action, and the commencement and prosecution of all other suits, actions, libels and/or proceedings of any kind or nature against the said petitioner for or on account of or in respect to any damage, loss, destruction or injury of any kind or nature to either persons or property, arising or occurring upon or in connection with the said Motor Vessel "NORCO" on July 20, 1931, and/or upon or in connection with the said voyage of said Motor Vessel "NORCO" ending at Juneau, Alaska, on July 25, 1931, be and the same are hereby restrained and enjoined, except before this Court in this proceeding.

It is FURTHER ORDERED that the service of this order as a restraining order may be made in this district by delivering a certified copy thereof to the person or persons to be restrained or their respective proctors or their attorneys, in case action, suit or other legal proceedings have been or are instituted.

Done in open court this 1st day of October, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Oct. 1, 1932. [13]

[Title of Court and Cause.]

MONITION.

The President of the United States of America:

To the Marshal of the United States for the Western District of Washington, Northern Division, GREETING:

WHEREAS, a petition was filed in the District Court of the United States for the Western District of Washington, Northern Division, on October 1st, 1932, by Northland Transportation Co., a corporation, praying for limitation of its liability as charterer of the Motor Vessel Norco, concerning all injury, loss, destruction or damage arising from or in connection with the voyage of said Motor Vessel Norco, commencing at Seattle, Washington, on July 20, 1931, and ending at Juneau, Alaska, on July 25, 1931, or occurring on or about July 20, 1931, on board said vessel in the Port of Seattle, for the reasons mentioned in said petition, and praying that a monition may issue out of said court, citing all persons, corporations, associations, firms, partnerships and their representatives, claiming damages for any and all injury, loss, destruction or damage as aforesaid; to appear before said court and make due proof of their respective claims, and answer the allegations of said petition and that if it shall appear that the petitioner is not liable for any such loss, damage, destruction or injury, it may be so finally decreed by this Court; and [14]

WHEREAS the petitioner has filed in the office of the clerk of this court an ad interim stipulation in the sum of $7500, with interest thereon at six per cent. per annum from the date of said stipulation as provided by an order heretofore duly entered herein, and the said court having directed by an order made and entered herein that a monition issue against all persons claiming damages for any injuries, losses, destructions or damages occasioned on said voyage, citing them to appear before this court and make due proof of their respective claims, on or before the 10th day of November, 1932, now, therefore

YOU ARE COMMANDED to cite all persons claiming damages for any injury, loss, destruction or damage on said voyage of said Motor Vessel Norco, commencing at Seattle, Washington, and ending at Juneau, Alaska, on July 25, 1931, or occurring in the Port of Seattle, on or about July 20, 1931, to appear before said court and make due proof of their respective claims on or before the 10th day of November, 1932.

YOU ARE ALSO COMMANDED to cite all claimants to appear and answer the petition herein on or before the last named date or within such further time as this court may grant, to have and receive such relief as may be due, and what you have done in the premises do you then make return to this court, together with this writ.

WITNESS the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington this 1st day of October, 1932.

ED M. LAKIN,
Clerk.
By S. COOK,
Deputy Clerk.

(Served Oct. 3, 1932.)
BOGLE, BOGLE & GATES,
Proctors for Petitioner
Office and Post Office Address:
609-24 Central Building, Seattle, Washington.
[Endorsed]: Filed Oct. 5, 1932.) [15]

[Title of Court and Cause.]

EXCEPTIONS TO PETITION FOR LIMITATION OF LIABILITY

Comes now the respondent, Chris Larsen, and excepts to the petition for limitation of liability herein, upon the following grounds:

1. That said petition does not state facts sufficient to entitle the petitioner to a limitation of liability.

2. That the petitioner by failing and refusing to claim limitation of its liability in the Superior Court of the State of Washington for King County has waived its right to such limitation of liability.

Dated this 7th day of October, 1932.

VANDERVEER & BASSETT,
Proctors for Respondent.

(Served Oct. 7, 1932.)

[Endorsed]: Filed Oct. 8, 1932. [16]

[Title of Court and Cause.]

DEMURRER AND MOTION TO DISMISS PETITION FOR LIMITATION OF LIABILITY

Comes now the respondent, Chris Larsen, and demurs to the petition for limitation of liability herein and moves to dismiss the same on the following grounds:

1. That said petition does not state facts sufficient to entitle the petitioner to limitation of its liability.

2. That there is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and obtained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County.

3. That the petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to

claim and obtain the advantage and benefit of said statute.

This motion is based upon the files and records herein and upon the affidavit of G. F. Vanderveer, one of the proctors for the Respondent, Chris Larsen, which is attached hereto and made a part hereof by this reference.

G. F. VANDERVEER & S. B. BASSETT,
Proctors for Respondent.

(Served Oct. 7, 1932.)

[Endorsed]: Filed Oct. 8, 1932. [17]

AFFIDAVIT OF G. F. VANDERVEER.

United States of America,
Western District of Washington,
County of King,—ss.

G. F. VANDERVEER, being first duly sworn on oath deposes and says: That he is one of the proctors for the respondent, Chris Larsen, and that he makes this affidavit in support of the respondent's motion to dismiss the petition for limitation of liability herein. That the attached certified copies of the complaint, answer, and reply in the cause entitled Chris Larsen, Plaintiff v. Northland Transportation Co., defendant, being cause No. 247091 of the causes of the Superior Court of the State of Washington for King County, constitute all of the pleadings in said cause and set forth

all of the issues upon which said cause was tried and determined.

G. F. VANDERVEER.

Subscribed and sworn to before me this 7th day of October, 1932.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington, residing at Seattle. [18]

In the Superior Court of the State of Washington for King County.

No. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the State of Washington, was the owner of, and operated, the United States Motorship "Norco" in maritime commerce between

the Port of Seattle and various Alaska ports, maintained offices for the transaction of its business in Seattle, Washington, employed one William Seymour as its manager, and one Ernest Doe, whose true Christian name is to the plaintiff, unknown, as winchman and the plaintiff as an able seaman aboard said Motorship "Norco."

II.

That on the 20th day of July, 1931, at about ten minutes before noon, while said vessel was lying moored at Pier 5, in the City of Seattle, preparatory to loading cargo, at the direction of William Seymour aforesaid, the plaintiff and a longshoreman, whose name is to the plaintiff unknown, hooked the spreader on the fall line onto three empty board slings which were at the time lying on the main deck on the starboard side of the hatchway for the purpose of placing the same on the dock where they would be out of the way of the longshoremen who were to load said cargo. That in some manner unknown to the plaintiff one of said board slings had become foul of a strop around the strongback on which they were lying in such a manner that in lifting the board [19] slings the winchman would also lift said strongback. When the fall line had been hooked onto said board slings as aforesaid, and before the plaintiff had an opportunity to reach a place of safety, said Ernest Doe negligently, and without warning the plaintiff of his intention so to do, went ahead with great speed

on the winches and thereby caused said strongback to be lifted from the deck and swung inboard in such a manner as to strike the plaintiff and throw him against the hatch coaming. That thereupon ordinary prudence required that said Ernest Doe either slack away on the port winch or hold said load on the starboard winch in order to prevent it from again striking the plaintiff, but instead of so doing he negligently went ahead with great speed on the port winch and caused said strongback to swing violently inboard a second time, striking the plaintiff with such violence as to throw him through the open hatchway to the 'tween decks; a distance of ten feet below, where he alighted on his head and shoulders, fracturing his fifth left rib and puncturing his left lung, severely bruising his left shoulder and the back of his right hand and severely injuring the tissues of his brain and causing a traumatic edema of the brain.

III.

That at the time of receiving said injuries the plaintiff was an able bodied man of the age of forty-four years, with a normal life expectancy of 25.27 years, and was actually earning, and capable of earning, wages, with overtime, in the sum of $125.00 a month and subsistence of the further value of $60.00 a month. That as a result of the injuries to his head and lungs he is informed and believes, and therefore alleges, that his general health has been permanently and so seriously impaired that he will never again be able to perform heavy manual labor;

that he has been wholly unable to perform any gainful labor since his injury; that he has been required to expend large sums of money for the services of physicians, and that he is informed and believes that it will be necessary to undergo a serious and dangerous surgical operation to relieve the pressure on his brain, all to his damage in the sum of $25,000.00. [20]

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $25,000.00, together with his costs and disbursements herein.

VANDERVEER & BASSETT,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

CHRIS LARSEN, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

CHRIS LARSEN.

Subscribed and sworn to before me this 30th day of September, 1931.

[Seal] G. F. VANDERVEER,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in County Clerk's Office, King County, Wash., Oct. 23, 1931.
ABE N. OLSON, Clerk,
By S. R. Battenfield, Deputy. [21]

In the Superior Court of the State of Washington for King County.

No. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

ANSWER.

Comes now the defendant above named and for answer to plaintiff's complaint herein denies the same and each and every allegation therein contained and particularly denies that plaintiff has been damaged in the sum of $25,000 as therein alleged, or any other sum or sums whatsoever or at all.

FURTHER ANSWERING said plaintiff's complaint, and by way of a first affirmative defense thereto, defendant alleges:

I.

That the alleged injury or damage to the plaintiff, if any, was proximately caused or contributed to by his own negligence and want of care.

FURTHER ANSWERING said complaint, and by way of a second affirmative defense thereto, defendant alleges:

I.

That the condition of the Steamship Norco, its appurtenances, equipment, hatches and deck arrangement were all known to plaintiff and in plain view of said plaintiff during all times mentioned in his complaint and with full knowledge and notice thereof, and without objection or complaint the plaintiff voluntarily assumed all risk incident thereto.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed with prejudice and it have and recover its costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

WILLIAM SEMAR, being first duly sworn on on oath deposes [22] and says: That he is Secretary-Treasurer of the defendant corporation above named; that he makes this verification by its authority for and in its behalf being authorized so to do; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

WILLIAM SEMAR.

Subscribed and sworn to before me this 18th day of November, 1931.

[Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in County Clerk's Office, King County, Wash., Nov. 19, 1931.
ABE N. OLSON, Clerk,
By S. R. Battenfield, Deputy. [23]

In the Superior Court of the State of Washington for King County.

NO. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

REPLY.

Replying to each of the two affirmative defenses in the defendant's Answer the plaintiff denies each and every allegation therein contained.

WHEREFORE, having fully replied, the plaintiff demands judgment in accordance with the prayer of his complaint.

VANDERVEER & BASSETT,
Attorneys for Plaintiff.

State of Washington,
County of King.—ss.

CHRIS LARSEN, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true.

CHRIS LARSEN.

Subscribed and sworn to before me this 20th day of November, 1931.

[Seal] G. F. VANDERVEER,
Notary Public in and for the State of Washington, residing at Seattle.

Received,
Bogle, Bogle & Gates,
Nov. 21, 1931,
Seattle. [24]

In the Superior Court of the State of Washington
for the County of King.

NO. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO.,
a corporation,

Defendant.

State of Washington,
County of King.—ss.

I, ABE N. OLSON, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that I have compared the foregoing copy with the original complaint—answer—and reply in the above entitled cause as the same appears on file and of record in my office, and the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and seal of the said Superior Court, at my office in Seattle, this 7th day of October, 1932.

[Seal] ABE N. OLSON, Clerk.

By A. L. Lawrence, Deputy. [25]

[Title of Court and Cause.]

DECISION

(On Limitation, etc.)

November 22, 1932.

BOGLE, BOGLE & GATES,
Proctors for Petitioner;
VANDERVEER & BASSETT,
Proctors for Respondent.

NETERER, District Judge:

The suitor (movant) pursuing his common law remedy in the state court for personal injury by negligence (section 24, J. C.) obtained judgment, and thereupon the judgment debtor petitioned this court for limitation of liability "to charterer's interest in the vessel (etc.) * * * and freights, and passenger moneys pending on the voyage (etc.) * * *." (Sec. 4283, R. S.).

The right to limit is challenged, for that there being only one claimant and the value of the interest in the vessel was not pleaded and determined in the state court, and by failure, the right to limit is waived and the issue is now res judicata.

Limitation proceedings involve two issues: (1) liability; (2) limitation of liability when liability is adjudged. The right to invoke the state court jurisdiction under section 24, J. C., to [26] adjudicate negligence where a jury trial is afforded, is clear. Langness v. Green, 282 U. S. 531, at 539.

In Langness v .Green, supra, petition for limitation was presented in the federal court after action commenced in the state court. The state court afforded a common law remedy on the negligence issue, and the federal statute a right to seek limitation of liability in the federal district court.

When there is one possible claimant, the charterer or owner may claim in the state court that the judgment on negligence, if any, be limited to the ship's value, and if the right is not contested, judgment accordingly may follow, and " * * * the advantages of this section (4283) may be obtained by proper pleading. * * * In the due course of the exercise of its common law powers (the state court) was competent to entertain a claim of the ship owner for limitation of liability, and afford the appropriate relief under the statute dealing with that subject. * * * Notwithstanding this, however, the ship owner was free to invoke the jurisdiction of the federal district court." But this may be done *only* when the "question is raised (in the state court) as to the right of the petitioner to limit liability." Ex Parte Green, 286 US 437, at 439.

To pursue the common law remedy in the state court, the suitor must admit the right to limit liability, if raised, thus withdrawing from the case any federal question, and his recovery, if any, will be limited to the value of the charterer's interest. But, if issue is taken upon the right to limit, when this court has jurisdiction of the controversy. Ex

parte Green, 56 Fed. (2) 644; affirmed 286 US 437; Langness v. Green, 282 US 531.

The state court being competent to give common law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could with propriety have been determined in that suit, it was his [27] duty to plead the limitation of liability, if any, to the value of his interest in the ship. An adequate remedy was available and not put forward, and escape from the judgment which followed cannot be made. American Surety Co. v. Baldwin, ... US ....., decided November 14, 1932. Compare Mitchell v. First National Bank of Chicago, 180 US 471; Lion Bonding & Surety Company v. Karatz, 262 US 77, 90. The judgment upon the merits is res judicata not only as to the issue presented, but also as to rights and issues which might have been presented. Baltimore Steamship Company v. Phillips, 274 US 316; see, also, United States v. Sakharam Ganesh Pandit, 15 Fed. (2) 285; certiorari denied, 273 US 759.

The petitioner was not at liberty to present his defense by piecemeal and litigate the liability in the state court. Werlein v. New Orleans, 177 US 390; United States v. California & Oregon Land Company, 192 US 355. Grubb v. Public Utilities Comm., 281 US 470, 479. See, also, American Surety Co. v .Baldwin, supra.

From the foregoing, it is obvious that my view is out of harmony with In Re Moran Bros. Contracting Co., Inc., 1932 AMC 910; and In Re Starin, 124 Fed. 101, and the W. T. Wellington, 235 Fed. 728. In The Benefactor, 103 US. 239 and Monongahela River Consol. Coke & Coal Co. v. Hurst, 200 Fed. 711, there was more than one creditor in each case.

While the instant issue was not raised by answer, but rather in the nature of exceptive allegations, the issue at bar was submitted upon the right to limit liability upon the facts stated, and acting upon the assumption that upon this challenge is agreed the right to limit liability shall be now finally determined, an order dismissing the petition, endorsing such understanding, may on notice be presented.

NETERER,
United States District Judge.

[Filed Nov. 22, 1932.]

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 13,301.

In the Matter of the Petition of NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel NORCO for LIMITATION OF LIABILITY.

ORDER OF DISMISSAL.

This matter having come duly on for hearing before the above entitled court on the 31st day of October, 1932, on the respondent's demurrer to, and motion to dismiss the petition for limitation of liability herein, the petitioner appearing by Messrs. Bogle, Bogle and Gates, its proctors, the respondent appearing by Messrs. Vanderveer and Bassett, his proctors, and the court having duly considered the record herein and the arguments of the proctors for both parties, and it appearing therefrom without dispute that the respondent brought an action at common law against the petitioner in the Superior Court of the State of Washington for King County for the recovery of damages for personal injuries alleged to have been suffered by the respondent through the petitioner's negligence, and it further appearing that the petitioner herein made a general appearance in said action and answered the respondent's complaint, but wholly failed to make any claim of right to limit its liability under

the laws of the United States, and it appearing that said action was in due course tried before a jury which returned a verdict in the respondent's favor, assessing his damages in the sum of $12,500, and that thereafter, on the 1st day of October, 1932, said court duly entered a judgment on said verdict in favor of the respondent and against the petitioner for the sum of $12,500, and costs, and it further [29] appearing that no other claim has been filed in response to the monition, and the time for filing claims having expired on the 10th day of November, 1932, and petitioner has not shown or contended that other claims exist, and it further appearing that the Superior Court of the State of Washington for King County had full jurisdiction to determine the value of the petitioner's interest in the American Motor Vessel "Norco" and all pending freight and to limit the petitioner's liability accordingly, and it appearing that its jurisdiction to do so was in no manner questioned by the respondent herein,

THE COURT NOW CONCLUDES that, by its failure to make any claim in said court of its right to limit its liability, the petitioner herein waived such right, and that all matters pertaining to the merits of said common law action, including petitioner's right to limit its liability to the respondent, were fully adjudicated, and

IT IS NOW ORDERED that the petition for limitation of liability herein be dismissed and that

the order heretofore made herein, restraining the further prosecution of said action in the Superior Court of the State of Washington for King County, and or the issuance of an execution on the judgment obtained therein be, and the same is hereby, dissolved. Petitioner excepts and same is allowed.

Done in open court this 5th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Served and filed Dec. 5, 1932. [30]

[Title of Court and Cause.]

PETITION FOR APPEAL AND FOR STAY OF EXECUTION.

To the Honorable Jeremiah Neterer, District Judge:

The petitioner, Northland Transportation Co., a corporation, feeling aggrieved by the order of dismissal made and entered in the above entitled cause on the 5th day of December, 1932, does hereby appeal from said order of dismissal and each and every part thereof, and from each and every adverse ruling made in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and prays that its appeal be allowed and execution on said order of dismissal be stayed pending the determination of said appeal, and that

citation be issued and other proceedings be had as provided by law.

Dated this 5th day of December, 1932.

NORTHLAND TRANSPORTATION CO.,
a corporation, Petitioner,
By BOGLE, BOGLE & GATES,
Its Proctors.

[Endorsed]: Served and filed Dec. 5, 1932. [31]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Northland Transportation Co., a corporation, petitioner-appellant, and assigns errors in the rulings and proceedings in the above entitled cause on the part of the Trial Court, the District Court of the United States for the Western District of Washington, Northern Division, as follows:

1. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that the Superior Court of the State of Washington for King County had full jurisdiction to determine the value of the petitioner's interest in the American motor vessel Norco and all pending freight, and to limit the petitioner's liability accordingly.

2. That said trial court erred in its memorandum decision filed herein and in the order of dis-

missal entered herein on December 5, 1932, in ruling and adjudging that petitioner by failing to make any claim in the Superior Court of the State of Washington for King County, of its right to limit its liability, waived its right to do so in this proceeding.

3. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that all matters pertaining to the merits of the common law action in the Superior Court [32] of the State of Washington for King County, including the petitioner's right to limit its liability to the respondent, were fully adjudicated.

4. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that the petition for limitation of liability herein be dismissed.

5. That said trial court erred in its memorandum decision filed herein and in the order of dismissal filed herein on December 5, 1932, in ruling and adjudging that the order heretofore made herein, restraining the further prosecution of said action in the Superior Court of the State of Washington for King County and/or the issuance of an execution of the judgment obtained therein be dissolved.

6. That said trial court erred in the order of dismissal filed herein on December 5, 1932, in finding and ruling that petitioner failed to make any

claim of right to limit its liability under the laws of the United States in said action in the Superior Court of the State of Washington for King County.

7. That said trial court erred in the order of dismissal filed herein on December 5, 1932, in finding and ruling that no other claim has been filed in response to the monition, that the time for filing claims expired on November 10, 1932, and petitioner has not shown or contended that other claims exist.

8. That said trial court erred in entering the order of dismissal filed herein on December 5, 1932, and in not denying the respondent's motion to dismiss, and in not overruling the respondent's demurrer to the petition for limitation of liability, and in not overruling respondent's exceptions to the petition for limitation of liability. [33]

WHEREFORE petitioner-appellant prays that said order of dismissal be reversed.

BOGLE, BOGLE & GATES,
Proctors for Petitioner-Appellant.

[Endorsed]: Served and filed Dec. 6, 1932. [34]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND STAYING EXECUTION.

On petition for appeal and for stay of execution, and all parties being represented,

IT IS ORDERED that the appeal be allowed as prayed and that citation on appeal issue; and

IT IS FURTHER ORDERED that the sum of $7,500.00 be, and the same hereby is, fixed as the amount of bond on appeal, to serve both as cost bond and supersedeas bond, and that upon the filing thereof execution upon the order of dismissal entered herein shall be stayed, and the restraining order heretofore entered herein, and the monition and citation heretofore issued herein shall remain in full force and effect during the pendency of the appeal.

Done in open court this 5th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Served and filed Dec. 5, 1932. [35]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To: CHRIS LARSEN, respondent, and to Messrs. Vanderveer & Bassett, his proctors, and to the HONORABLE JEREMIAH NETERER and ED M. LAKIN, Clerk of the above entitled court.

NOTICE IS HEREBY GIVEN that petitioner, Northland Transportation Co., a corporation, hereby appeals to the United States Circuit Court of

Appeals for the Ninth Circuit from the order of dismissal made and entered herein on the 5th day of December, 1932, and from each and every part thereof, and from each and every adverse ruling in the above entitled cause.

Dated this 5th day of December, 1932.

NORTHLAND TRANSPORTATION CO.,
a corporation, Petitioner,
By BOGLE, BOGLE & GATES,
Its Proctors.

[Endorsed]: Served and filed Dec. 5, 1932. [36]

[Title of Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Northland Transportation Co., a corporation, as principal, and Fireman's Fund Indemnity Co., a corporation, authorized to transact business in the State of Washington, as surety, are held and firmly bound unto Chris Larsen, in the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, lawful money of the United States, to be paid to said Chris Larsen, respondent herein, for which payment, well and truly to be made, we bind our, and each of our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 6th day of December, 1932.

WHEREAS, the said Northland Transportation Co., a corporation, principal herein, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of dismissal entered in the United States District Court for the Western District of Washington, Northern Division on the 5th day of December, 1932; and

WHEREAS, the said Northland Transportation Co., a corporation, principal herein, desires during the process of said appeal [37] to stay the execution of said order of dismissal, and to keep in full force and effect during the pendency of said appeal the restraining order heretofore entered herein, and the monition and citation heretofore issued herein in the United States District Court for the Western District of Washington; and

WHEREAS, the said court has heretofore fixed the amount of the supersedeas bond and cost bond on appeal, and has ordered that one bond may be filed in the total sum of Seven Thousand Five Hundred ($7500.00) Dollars, to act as a cost bond and as a supersedeas bond on appeal,

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Northland Transportation Co., a corporation, principal herein, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, and shall abide by and perform what-

ever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the cause, or on the mandate of that court to the District Court, then this obligation shall be void, otherwise the same to be and remain in full force and effect.

NORTHLAND TRANSPORTATION CO., a corporation,
By BOGLE, BOGLE & GATES,
Its Attorneys.
Principal.

[Seal] FIREMAN'S FUND INDEMNITY CO., a corporation,
By Frank Taylor,
Attorney-in-fact,
Surety [38]

The foregoing bond as an appeal and supersedeas bond in the above entitled cause is hereby approved as to form, amount, and sufficiency of surety, and receipt of a copy thereof is hereby acknowledged this 6th day of December, 1932.

VANDERVEER & BASSETT,
Proctors for Respondent.

The foregoing bond and sufficiency of surety thereon is, on this 6th day of December, 1932, approved as an appeal and supersedeas bond.

NETERER,
District Judge.

[Endorsed]: Filed Dec. 6, 1932. [39]

[Title of Court and Cause.]

NOTICE OF FILING COST AND SUPERSEDEAS BOND.

To: Chris Larsen, Respondent, and to Vanderveer & Bassett, his Proctors:

You and each of you will please take notice that on the 6th day of December, 1932, the Northland Transportation Co., a corporation, petitioner in the above entitled cause, filed in the office of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a cost and supersedeas bond in the total sum of Seven Thousand Five Hundred ($7500.00) Dollars, a copy of which bond is herewith served upon you, and that the surety upon said cost and supersedeas bond on appeal is Fireman's Fund Indemnity Co., a corporation, which said surety has an office and resident agent in the Colman Building, Seattle, Washington.

Dated at Seattle, Washington, this 6th day of December, 1932.

BOGLE, BOGLE & GATES,
Proctors for Petitioner.

[Endorsed]: Served and filed Dec. 6, 1932. [40]

[Title of Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL.

It is stipulated that apostles on appeal containing all matters designated by the praecipe filed by appellant shall be sufficient record on appeal.

BOGLE, BOGLE & GATES,
Proctors for Appellant.

[Endorsed]: Filed Dec. 15, 1932.

VANDERVEER & BASSETT,
Proctors for Appellee.

ORDER.

In accordance with the foregoing stipulation, it is so ordered.

Done in open court this 15th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Dec. 15, 1932. [41]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above Entitled Court:

You will please prepare and certify a true copy of the following papers on file in your office, and of record in the above entitled cause, as apostles on appeal, to-wit:

1. Names and addresses of proctors and title.
2. Statement.
3. Petition for limitation of liability.
4. Order directing issuance of monition.
5. Monition.
6. Exceptions to petition for limitation of liability.
7. Demurrer and motion to dismiss petition for limitation.
8. Affidavit of G. F. Vanderveer with exhibits attached thereto.
9. Court's memorandum decision.
10. Order of dismissal.
11. Petition for appeal and for stay of execution.
12. Assignment of errors.
13. Order allowing appeal and staying execution.
14. Notice of appeal.
15. Cost and supersedeas bond on appeal.
16. Notice of filing bond. [42]
17. Stipulation and order as to record on appeal.
18. Citation.
19. This praecipe.

In the preparation of said record there may be omitted the full title of various pleadings, the full filemark thereon, and the verification thereof, it

being sufficient that the record on appeal contain a plain designation of the various pleadings and papers, together with a notation of the date when the same were filed and/or served.

BOGLE, BOGLE & GATES,
Proctors for Appellant.

[Endorsed]: Filed Dec. 15, 1932. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington.—ss

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 43, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same rmain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, in said cause, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit: [44]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 85 folios at 15c per folio,	$12.75
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Apostles on Appeal	.50
Total	$18.25

I hereby certify that the above cost of preparing and certifying said apostles on appeal, amounting to $18.25 has been paid to me by the proctors for the appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 28th day of December, 1932.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By T. W. EGGER,
Deputy. [45]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

THE PRESIDENT OF THE UNITED STATES to CHRIS LARSEN, Respondent-Appellee, and to MESSRS. VANDERVEER & BASSETT, his Proctors,

GREETINGS:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal in said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein Northland Transportation Co., a corporation, is appellant, and Chris Larsen is appellee, then and there to show cause, if any there be; why the order of dismissal of the United States District Court for the Western District of Washington, Northern Division, signed by the Honorable Jeremiah Neterer, Judge of said Court, upon December 5, 1932, and filed on said date with the clerk of said Court, as to which this appeal is filed and taken, should not be corrected and reversed, and why speedy justice should [46] not be done in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 6th day of December, 1932.

[Seal] JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Served and filed Dec. 6, 1932. [47]

[Endorsed]: No. 7036. United States Circuit Court of Appeals for the Ninth Circuit. Northland Transportation Co., a Corporation, Charterer of the American Motor Vessel "Norco," Appellant, vs. Chris Larsen, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 30, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7036

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the thirty-first day of May in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7036.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

ORDER OF SUBMISSION

ORDERED above cause argued by Mr. James M. Wallace, proctor for appellant, and by Mr. Sam B. Bassett, proctor for appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit. the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-first day of August in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, IT IS ORDERED that the opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges:

WILBUR, Circuit Judge:

Appellant brought this proceeding in admiralty for the limitation of its liability for an accident occurring on board the Norco, a vessel chartered by the appellant, Northland Transportation Company. The petition alleged that on July 20, 1931, while the vessel was loading at the port of Seattle, Chris Larsen, while engaged in loading said vessel as a member of the crew thereof, suffered personal injuries; that the injured seaman brought an action in the Superior Court of the State of Washington for King County to recover $25,000 damages by reason of the injuries received through the alleged negligence of a winch driver in operating the winches, as result of which the seaman was thrown through an open hatchway and injured; that a verdict and judgment in said action in the Superior Court of King County was rendered on September 27, 1932 in favor of the seaman and against the petitioner for a sum of $12,500 with interest and costs; that the value of the interest of petitioner in the vessel, her machinery, tackle, etc., together

with all freight and passenger moneys pending on said voyage amounted to $4651.98, of which $3856.00 was the amount of freight and passenger moneys pending on the voyage; that the vessel was staunch and seaworthy and well and sufficiently supplied, manned and equipped, etc.; and that the injury was without the consent or privity or knowledge, design or neglect of the petitioner, or any of its directors, officers, agents or servants. Petitioner claims the right to have its liability limited to the value of the vessel, etc., and prayed for appropriate relief. (Rev. Stat. §§4282 to 4289; 46 U. S. C. A. §§183, 185, 186.)

Appellee filed exceptions to the petition for limitation of liability upon the ground that it did not state facts sufficient to entitled the petitioner to a limitation of liability and that by reason of the failure and refusal of the petitioner to claim limitation of liability in the Superior Court of Washington for King County it had waived its right to limitation of such liability. The appellee also filed a demurrer and motion to dismiss upon the same grounds and upon an affidavit thereto attached, which affidavit set forth the pleadings in the action in said Superior Court. It appears therefrom that the appellee, plaintiff therein, counted upon the negligence of Ernest Doe in operating a winch on board the vessel Norco while it was moored at pier No. 5 in the city of Seattle preparatory to loading cargo. The answer of the Northland Transporta-

tion Company, appellant herein, and defendant therein, consisted of a general denial, a plea of contributory negligence and a plea of assumption of risk.

The District Court sustained the appellee's contentions and dismissed the proceedings upon the ground, as stated in the order of dismissal, that by its failure to make any claim of its right to limit its liability in the common law action in the Superior Court the petitioner waived such right, and that all matters pertaining to the merits of said common law action including petitioner's right to limit its liability were res adjudicata. Petitioner appeals from the decree of dismissal.

It has been held in many instances by district courts sitting in admiralty and by circuit courts of appeals reviewing those decisions that the right of the owner to limit his liability is in no wise affected by the fact that the claim against him had been prosecuted to judgment in a common law court and that a judgment had been rendered in that court for the full amount of the injury without reference therein to the limitation of the owner's liability as provided by federal law. *S. A. McCaully* (D. C.), 99 Fed. 302; *Re Old Dominion* (D. C.), 115 Fed. 845; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 298; *The Ocean Spray* (D. C. Cal.), 117 Fed. 971; *Re Starin* (D. C. N. Y.), 124 Fed. 101; *The City of Boston* (D. C. Mass.), 159 Fed. 257; *The Hoffmans* (D. C. N. Y.), 171 Fed. 455; *Re P. Sanford Ross* (D. C. N. Y.), 196 Fed. 921; *The Victor* (D. C. N.

Y.), 1 F. Supp. 931. It has been so decided by this court in *Strong v. Holmes* (C. C. A. 9), 238 Fed. 554. Also, it has been held that the admiralty court after a decree fixing the responsibility for the injury may entertain a petition for the limitation of the liability of the owner to the value of the vessel, etc., although the owner had not theretofore raised the question in the admiralty court. *The Benefactor*, 103 U. S. 239; *The Monongahela River Consol. Coal and Coke Co. v. Hurst*, 200 Fed. 711; *The Defender*, 214 Fed. 316; *The Ethelstan*, 246 Fed. 187. It appears from these cases that the proceeding to limit the owner's liability is separate and distinct from the common law remedy, or the question of liability in admiralty.

Appellee claims that these cases are not authority upon the proposition involved here by reason of the fact that the question of whether or not the judgment of the common law court was res adjudicata as to the amount of the claim was not raised in those cases. If not specifically raised, it was necessarily and obviously involved and these decisions must be taken as authority for the proposition that the judgment of the common law court fixing the amount of the damage and the responsibility of the owner therefor is not res adjudicata as to the right of the owner to limit his liability in the subsequent proceeding in an admiralty court, where the question was not raised in the common law action.

Appellee contends that in any event these decisions in effect have been overruled by *Langhes v. Green*,

282 U. S. 531, and *Ex Parte Green*, 286 U. S. 437. It was said in the latter case (*Ex Parte Green*), referring to the former case (*Langnes v. Green*),

> "It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case."

In what way did the claimant "accept" the value of the vessel as the limit of the owner's liability? He sought and secured a judgment for more than twice the value of the vessel, etc. The net result of these two decisions is that the Supreme Court holds that the District Court sitting in admiralty has exclusive jurisdiction to determine all the questions involved in a proceeding for the limitation of liability. These questions include, first, the question of responsibility of the owner of the vessel for the negligence upon which the claimant relies; second, if not personally responsible, the amount to which the recovery of the claimant should be limited, which requires the fixing of the value of the vessel, its appurtenances, freight, etc.; third, the application of that value or, at the election of the petitioner, the application of the proceeds of the sale of the vessel to the claim. (Admiralty Rule 51.) The appellee necessarily concedes this obvious result of these decisions but contends that, inasmuch as the

Supreme Court in *Langnes v. Green,* supra, acknowledges the power of the Superior Court to recognize the right of the owner to limit his liability by appropriate proceedings in the Superior Court, it necessarily follows that that court had jurisdiction of the matter, provided, however, in view of the later decision in *Ex Parte Green,* supra, that the question was not contested in the Superior Court. Consequently, appellee claims that, since he did not contest the right to limit the liability but on the contrary admitted that right by counting on the negligence of a fellow servant in his complaint in the Superior Court, making it appear on the face of the complaint that the owner was entitled as a matter of right to limit its liability in that Superior Court action to the value of the vessel, etc., the owner's failure to claim that right in that action operated as a waiver of the right and, also, resulted in an estoppel by the judgment rendered therein. This contention is based on the principle that a judgment estops the parties not only as to all things which were in fact adjudicated therein, but also all things which might have been adjudged therein.

Parties are not required to set up and litigate rights over which the court had no jurisdiction in order to protect themselves in enforcing their rights in a court which has jurisdiction. *Ash Sheep Co. v. United States,* 252 U. S. 159; *T. B. Harms & Francis, Day & Hunter v. Stern,* 229 Fed. 42; 34 C. J. 935, §1339.

We conclude that the judgment of the Superior

Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. We need go no further in this matter.

The remaining question, if it is a separate and distinct question, is as to whether or not the owner who has the right to set up its claim to the limitation of liability in the state court is deemed to have waived that right by reason of its failure so to do and by reason of allowing the case to proceed to judgment without at any time invoking the principle of limited liability. We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction. By not raising the question at all in the Superior Court the owner allowed the claimant to have the full benefit of the common law remedy including a jury trial. Failure to raise this question in the state court thus giving full recognition to claimant's common law right to a trial by jury, was a wise and generous recognition of that right permitting as it did the trial of the question of negligence before a jury unhampered by any of the questions peculiarly cognizable in the admiralty court. We conclude then, that there is nothing in the decisions of the

Supreme Court in *Langnes v. Green*, supra, or *Ex Parte Green*, supra, inconsistent with the right of the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary that this is the purport and effect of those decisions. The decisions of the Supreme Court in *Langnes v. Green* and *Ex Parte Green* are in full accord with the earlier decisions holding that the question of the owner's right to limit his liability was not prejudiced by a judgment at law or a decree in admiralty fixing the amount of the claimant's recovery, if the right to limit liability was not theretofore presented. See also, *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932; and, *The Kearny*, 1933 A. M. C. 705.

Decree reversed and case remanded for further proceedings in accordance herewith.

(Endorsed): Opinion. Filed Aug. 21, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7036

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Aug. 21, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirtieth day of October in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITIONS FOR REHEARING.

Upon consideration thereof, and of the petition of Amicus Curiae, filed September 19, 1933, and by direction of the court, IT IS ORDERED that the petition of appellee, filed September 18, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Vanderveer and Bassett, proctors for the appellee, and good cause there-

for appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including December 4, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, October 30, 1933.

[Endorsed]: Filed Oct. 30, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7036.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-three (63) pages, numbered from and including 1 to and including 63, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 8th day of November, A. D. 1933.

[Seal] PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 614

CHRIS LARSEN, PETITIONER,

vs.

NORTHLAND TRANSPORTATION CO[RP]-
PORATION, CHARTERER OF THE AMERICAN
VESSEL "*NORCO*," RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES CIRCUIT COURT
APPEALS FOR THE NINTH CIRCUIT
BRIEF IN SUPPORT THEREOF

GEORGE F. VANDEVERE
SAMUEL B. BASSETT,
Proctors for Petitioner.
511 Alaska Building, Seattle, Washington.

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Supreme Court of the United States

October Term 1933

CHRIS LARSEN, PETITIONER,

vs.

NORTHLAND TRANSPORTATION CO., A CORPORATION, CHARTERER OF THE AMERICAN MOTOR VESSEL "*NORCO*," RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Supreme Court of the United States:

The petition of Chris Larsen respectfully shows:

I.

Statement of Matter Involved

Proceedings Had in the State Court.

The petitioner, a seaman, commenced an action against the respondent, his employer, in the Superior Court of the State of Washington for King County,

under the Merchant Marine Act of 1920, Section 33, Chap. 250; Title 46, U. S. C. A., Section 688, to recover damages from the respondent as the alleged owner of the motor vessel "NORCO," for personal injuries sustained through the negligence of a winchman (Ap. 19-22).

The respondent's answer denied generally the allegations of the complaint and pleaded both contributory negligence and assumed risk as affirmative defenses.

Nowhere in its answer did the respondent allege that it was merely the *charterer* of the motor vessel "NORCO" and not the *owner* as alleged in the complaint, *nor did it plead its right to a limitation of liability as a partial defense.* (Ap. 23-24.) The petitioner's reply denied the allegations of these affirmative defenses (Ap. 25), and on the issues so framed, the case proceeded to trial, the jury returned a verdict in favor of the petitioner in the sum of $12,500, and in due course a judgment for that amount was entered in petitioner's favor (Ap. 4), from which judgment no appeal was taken to the highest court of the state.

Proceedings Had in the United States District Court.

After the judgment had been entered in the State Court, the respondent, as the alleged charterer of

the "NORCO," filed in the United States District Court its petition for limitation of liability under the Revised Statutes of United States, Sections 4282 to 4289; 46 U. S. C. A. Sections 183, 185, 186, praying that it be exempted from all liability, or, in the alternative, that its liability be limited to the amount of its interest in the "NORCO," alleged to be not more than $4651.98 (Ap. 2-10), and secured an ex parte order directing the issuance of a monition restraining the petitioner herein, from proceeding further with his action in the state court and from issuing a writ of execution on the judgment obtained therein. (Ap. 10-13.)

The respondent's petition for limitation of liability, which is in the usual form, nowhere alleges that there were any claims other than Larsen's the petitioner herein, nor that the respondent feared any other claims. (Ap. 2 to 7.) On the contrary, the nature of the accident as described in respondent's petition for limitation of liability, indicates that no other claims could possibly exist (Ap. 4); and, as was recited in the order of the District Court, dismissing the petition:

> "* * * No other claim has been filed in response to the monition, and the time for filing claims having expired on the 10th day of November, 1932, and the petitioner (respondent)

has not shown, or contended that other claims exist * * *." (Ap. 33.)

Your petitioner filed exceptions to the petition for limitation of liability (Ap. 16) and also demurred to, and moved to dismiss it (Ap. 17) on the ground that, there being only one claimant and one charterer, the state court had jurisdiction and was competent to grant the respondent the relief sought in the United States District Court; and that, by its failure to claim the benefit of the Limited Liability Act by proper pleading in the state court, the respondent had waived its right to such relief, and the issue had become *res judicata*. On the authority of *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931), and subsequent proceedings therein, *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932), the District Court held that by the judgment in the state court the respondent's claim to limitation of liability had become *res judicata* (Ap. 28-31) and, accordingly, dismissed the respondent's petition (Ap. 32-34). In so holding the District Court said, in part;

> "The state court being competent to give common law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could, with propriety, have been determined in that suit, it was his duty to plead the limitation of liability, if any, to the value of his interest, in the ship. An adequate remedy was avail-

able and not put forward, and escape from the judgment which followed cannot be made. American Surety Co. v. Baldwin (U. S.), 53 S. Ct. 98, 77 L. Ed. ___, decided November 14, 1932. Compare Mitchell v. First National Bank of Chicago, 180 U. S. 471, 21 S. Ct. 418, 45 L. Ed. 627; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 90, 43 S. Ct. 480, 67 L. Ed. 871. The judgment upon the merits is res judicata not only as to the issue presented, but also as to rights and issues which might have been presented. Baltimore Steamship Co. v. Phillips, 274 U. S. 316; 47 S. Ct. 600, 71 L. Ed. 1069. See, also, United States v. Sakharam Ganesh Pandit (C. C. A.), 15 F. (2d) 285, certiorari denied, 273 U. S. 759, 47 S. Ct. 473, 71 L. Ed. 878.

"The petitioner was not at liberty to present his defense by piecemeal and litigate the liability in the state court. Werlein v. New Orleans, 177 U. S. 390; 20 S. Ct. 682, 44 L. Ed. 817; United States v. California & Oregon Land Company, 192 U. S. 355, 24 S. Ct. 266, 48 L. Ed. 476; Grubb C. Public Utilities Comm., 281 U. S. 470, 479, 50 S. Ct. 374, 74 L. Ed. 972. See, also, American Surety Co. v. Baldwin, supra."

(1 Fed. Supp. 933; Ap. 30.)

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit on Appeal.

Following the decree of the District Court the respondent appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit (Ap. 34). The matter came on for argument before the Honorable Curtis D. Wilbur, William H. Sawtelle and

Francis A. Garrecht, Circuit Judges, at the October Term, 1932, at San Francisco, California, on the 31st day of May, 1933.

On the 21st day of August, 1933, the Honorable Circuit Court of Appeals filed its Opinion herein (Ap. 53-60), reported in 66 F. (2d) 651, reversing the judgment of the District Court and remanding the cause for further proceedings in accordance therewith. Omitting the Court's statement of the case and portions of the Opinion which do not deal strictly with the jurisdictional question involved, the opinion is as follows:

> "The District Court sustained the appellee's contentions and dismissed the proceedings upon the ground, as stated in the order of dismissal, that by its failure to make any claim of its right to limit its liability in the common law action in the Superior Court the petitioner waived such right, and that all matters pertaining to the merits of said common law action including petitioner's right to limit its liability were res adjudicata. Petitioner appeals from the decree of dismissal. (Ap. 55.)
>
> * * *
>
> "This contention is based on the principle that a judgment estops the parties not only as to all things which were in fact adjudicated therein, but also all things which might have been adjudged therein.
>
> "Parties are not required to set up and litigate rights over which the court had no jurisdiction in order to protect themselves in enforcing their

rights in a court which has jurisdiction. Ash Sheep Co. v. United States, 252 U. S. 159; T. B. Harms & Francis, Day & Hunter v. Stern, 229 Fed. 42; 34 C. J. 935, Sec. 1339.

"We conclude that the judgment of the Superior Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. We need go no further in this matter.

"The remaining question, if it is a separate and distinct question, is as to whether or not the owner who has the right to set up its claim to the limitation of liability in the state court is deemed to have waived that right by reason of its failure so to do and by reason of allowing the case to proceed to judgment without at any time invoking the principle of limited liability. We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction. (Ap. 58-59.) * * * We conclude then, that there is nothing in the decisions of the Supreme Court in Langnes v. Green, supra, or Ex Parte Green, supra, inconsistent with the right of the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary that this is the purport and effect of those decisions." (Ap. 59-60.)

Thereafter, on the 18th day of September, 1933, your petitioner filed a petition for rehearing (Ap.

62) pointing out that the Circuit Court of Appeals in said opinion had clearly and unequivocally held that the United States District Courts have *exclusive* jurisdiction to entertain a shipowner's claim for limitation of liability and that the state courts are without jurisdiction to afford him such relief; and that said holding is squarely contrary to the decisions of this Honorable Court in *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 521, *supra*, and *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212, *supra*. On October 30, 1933, the Circuit Court of Appeals denied the petition for rehearing (Ap. 62) but entered an order staying the issuance of mandate to and including December 4, 1933, to enable your petitioner to apply to this Court for a Writ of Certiorari (Ap. 62-63).

II.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Ninth Circuit has rendered a decision probably in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Re Putnam*, 55 F. (2d) 73, certiorari denied (1932), 286 U. S. 558, 52 S. Ct. 641, 76 L. Ed. 1292.

2. The Circuit Court of Appeals has decided an important question of federal and maritime law, involving the *jurisdiction* of the state courts to limit a shipowner's liability in certain cases, in a way probably untenable and in direct conflict with the applicable decisions of this Court in the following cases:

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927.

Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, *supra*.

Ex Parte Green, 286 U. S. 437, 76 L. Ed. 1212, *supra*.

3. The Circuit Court of Appeals held that *the respondent was not obliged to claim its right to a limited liability in the state court because that court had no jurisdiction to afford it such relief* and, therefore, concluded that the judgment of the state court was not *res judicata* of this issue. In the course of the opinion the Circuit Court made no less than three statements, each of which clearly indicates that such is that court's view of the law:

> "The net result of these two decisions (Langnes v. Green, supra, and Ex Parte Green, supra), is that the Supreme Court holds that the District Court sitting in admiralty has *exclusive* jurisdiction to determine all the questions involved in a proceeding for the limitation of liability. (Ap. 57.)

> "Parties are not required to set up and litigate rights over which the court had no jurisdiciton in order to protect themselves in enforcing their rights in a court which has jurisdiction. (Ap. 58.)
>
> "We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction." (Ap. 59.)

That this holding is squarely in conflict with the decision of this Honorable Court in *Langnes v. Green, supra*, can readily be demonstrated by reference to a few controlling statements therein:

> "In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283, U. S. C., Title 46, Sec. 183) may be obtained by proper pleading. The Lotta (D. C.), 150 Fed. 219, 222, Delaware River Ferry Co. v. Amos (D. C.), 179 Fed. 756.' Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 260, 66 L. Ed. 927, 930, 42 S. Ct. 475. See, also, American S. B. Co. v. Chase, 16 Wall. 522, 532, 533, 21 L. Ed. 369, 372." (282 U. S. 531, 540, 75 L. Ed. 520, 526.)

In the same case, with reference to the jurisdiction of the state courts your Honors further said:

> "Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the

exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. * * * Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner" (ship owner). (282 U. S. 531, 540, 541, 75 L. Ed. 520, 526).

4. If the respondent could have claimed its right to a limited liability in the state court but failed to do so, that issue is now clearly *res judicata*, and the decision of the Circuit Court of Appeals on that question is in conflict with the decisions of this Court in the following cases, holding that a litigant is not at liberty to prosecute his rights by piecemeal and that "'a judgment upon the merits in one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end":

Grubb v. Public Utilities Comm., 281 U. S. 470, 74 L. Ed. 979.

Werlein v. New Orleans, 177 U. S. 390, 398, *et seq.*, 44 L. Ed. 817, 830, 20 Sup. Ct. Rep. 682.

United States v. California & O. Land Co., 192 U. S. 355, 358, 48 L. Ed. 476, 478, 24 Sup. Ct. Rep. 266.

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 319, 71 L. Ed. 1069, 1071, 47 Sup. Ct. Rep. 600.

United States v. Moser, 266 U. S. 236, 241, 69 L. Ed. 262, 264; 45 Sup. Ct. Rep. 66.

Cromwell v. Sac. County, 94 U. S. 351, 352, 74 L. Ed. 195, 197.

5. For the further reasons advanced in the brief supporting this application your petitioner is advised and believes that the determination of the Circuit Court of Appeals in the case at bar was erroneous and in conflict with the decisions of this Honorable Court construing the Limited Liability Act, with reference to the jurisdiction of the state courts.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari may be issued under the seal of this Honorable Court directing the Circuit Court to certify to this Court a full and complete transcript of the record of all proceedings of said court in said cause entitled on its docket, Northland Transportation Co., a corporation, Charterer of the American Motor Vessel "NORCO," appellant, v. Chris Larsen, appellee, No. 7036, to the end that said cause may be reviewed and determined by this Court as provided by law.

GEORGE F. VANDERVEER,
SAMUEL B. BASSETT,
Proctors for Petitioner.

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SAMUEL B. BASSETT, being first duly sworn, deposes and says that he is one of the proctors for petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

SAMUEL B, BASSETT.

Subscribed and sworn to before me this 20th day of November, 1933.

G. F. VANDERVEER,

[SEAL] *Notary Public in and for the State of Washington, residing at Seattle.*

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded in law as well as in fact and not interposed for delay, and that the case is one in which the prayer of the petitioner should be granted by this Court.

SAMUEL B. BASSETT,

Proctor for Petitioner.

Supreme Court of the United States

October Term 1933

No._____

CHRIS LARSEN, Petitioner,

vs.

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel "NORCO," Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

OPINIONS OF COURTS BELOW

The opinion of the District Court (Ap. 28-31) is reported in 1 Federal Supplement 932, and the opinion of the Circuit Court of Appeals (Ap. 53-60) in 66 F. (2d) 651.

II.

JURISDICTION

1. The decree herein sought to be reviewed was filed and entered on August 21, 1933. (Ap. 61-62).

Petition for rehearing was filed on September 18, 1933, and denied on October 30, 1933, (Ap. 62), and on the same day the Circuit Court of Appeals entered an order staying issuance of its mandate to and including December 4, 1933, to enable your petitioner to apply to this Court for a Writ of Certiorari. (Ap. 62-63).

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347, providing in part as follows:

> "In any case, civil or criminal, in the Circuit Court of Appeals, * * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment, or decree, by such a lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted Writ of Error on Appeal."

3. The following cases are believed to sustain the jurisdiction of this Court:

Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520; Certiorari granted, 281 U. S. 708, 50 S. Ct. 246, 74 L. Ed. 1131.

American Car & Foundry Co. v. Brassert, 53 S. Ct. 618, 77 L. Ed. __, Certiorari granted, 77 Sup. Ct. Adv. Op. 510.

Flink v. Paladini, 279 U. S. 59, 49 S. Ct. 255, 75 L. Ed. 613; certiorari granted, 278 U. S. 589, 49 S. Ct. 24, 73 L. Ed. 523.

Earle & Stoddard, Inc., v. Ellerman's Wilson Line, 53 S. Ct. 200, 77 L. Ed. __, Certiorari granted, 286 U. S. 535, 52 S. Ct. 498, 76 L. Ed. 1275.

III.

STATEMENT OF THE CASE

A complete statement of the case is given in the foregoing petition and in the opinion of the Circuit Court of Appeals (Ap. 53-55), and, in the interest of brevity, will not here be repeated.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals misconstrued the decisions of this Court in *Langnes v. Green*, and *Ex Parte Green, supra*, and erred in holding that "the District Court sitting in admiralty has *exclusive* jurisdiction to determine all questions involved in a proceeding for the limitation of liability" *where there is only one claimant and only one owner, and where the owner's right to limit liability is not disputed.*

2. The Circuit Court of Appeals erred in holding that the state court had no jurisdiction to entertain

the claim of the ship owner for limitation of liability *where there is only one claimant and only one owner, and where the owner's right to limit liability was not disputed.*

3. The Circuit Court of Appeals erred in holding that, *in such a case*, the ship owner was under no obligation to submit his claim to limited liability to the state court, and in holding that the judgment of the state court was not *res judicata* as to all issues which might have been submitted for its decision.

4. The Circuit Court of Appeals erred in reversing the decree of the District Court dismissing the respondent's petition for limitation of liability.

V.

QUESTIONS PRESENTED

1. In an action brought in the state court by a seaman against a ship owner to recover damages for personal injuries, *when there is only one possible claimant and only one owner, and when the right of the owner to a limitation of the liability is not disputed*, has the state court jurisdiction to limit the ship owner's liability?

2. *In such a case*, is the ship owner required to plead his right to a limitation of liability as a partial defense in the state court, or may he wait until final

judgment has been rendered against him in that court and then invoke the jurisdiction of an admiralty court?

3. If, having the right to take advantage of the Limited Liability Act in the state court, the ship owner fails to do so, is the judgment of that court on the merits *res judicata* of the issue.

VI.

STATUTES INVOLVED

(1) Section 24 (3) Judicial Code, Title 28, U. S. C. A., Section 41 (3);

(2) Title 46, U. S. C. A., Section 688, Act of March 4, 1915, c. 153, Section 20; 38 Stat. 1185, as amended by Act of June 5, 1920, c. 250, Section 33, 41 Stat. 1007;

(3) Title 46, U. S. C. A., Sections 183, 184, 185, Revised Statutes, Sections 4283, 4284, 4285.

VII.

ARGUMENT

INASMUCH AS THERE WAS ONLY ONE POSSIBLE CLAIMANT AND ONE OWNER, AND THE OWNER'S RIGHT TO LIMIT LIABILITY WAS NOT DISPUTED, THE STATE COURT WAS COMPETENT TO DETERMINE THE VALUE OF THE VESSEL AND ITS PENDING FREIGHT

Both the District Court and the Circuit Court of Appeals accepted *Langnes v. Green*, 282 U. S. 531, 75 L. Ed. 520, and *Ex Parte Green*, 286 U. S. 437, 76 L.

Ed. 1212, *supra*, as conclusive of the issue to be decided, but disagreed in the interpretation to be placed upon these decisions. The same is true of the proctors for the respective parties to this action. We contend, and the District Court held, that inasmuch as there was only one possible claimant and only one owner, and inasmuch as the owner's right to a limitation of liability was not disputed in the state court, that court had jurisdiction, and was in every way competent, to determine the value of the respondent's interest in the "Norco" and to limit its liability accordingly.

The proctors for the respondent contend, however, and the Circuit Court of Appeals held, that *in such a case*

> "the District Court sitting in admiralty had *exclusive* jurisdiction to determine all questions involved in a proceeding for a limitation of liability" (Ap. 57),

and that the respondent, therefore, was not required to claim advantage of the Limited Liability Act by proper pleading in the state court. A mere statement of this issue suggests the necessity for a more careful examination of the decisions referred to.

Langnes v. Green was an action brought by a seaman in the Superior Court of King County, Washington, to recover damages for personal injuries alleged to have been caused by the negligence of the shipowner

and defective appliances and equipment of the halibut vessel "Aloha." The shipowner filed an answer therein denying the allegations of negligence and pleading the affirmative defenses of assumed risk and contributory negligence, which were controverted by the plaintiff's reply. The cause being thus at issue, the plaintiff demanded a trial by jury, and it was assigned for trial. Two days before the trial date, the shipowner instituted a proceeding in the United States District Court for the Western Disrict of Washington, for a limitation of his liability, alleging that the plaintiff's claim in the action referred to greatly exceeded the value of his vessel. An injunction thereupon issued restraining the further prosecution of the action in the state court. The time for filing claims having expired, and the Commissioner having reported to the District Court that the only claim filed was that of Green, and an order of default having been entered against all other claimants, Green moved to dissolve the restraining order, or, in the alternative, to dismiss the petition for limitation of liability, on the ground that the state court had jurisdiction of the case, and, there being only one possible claimant and one owner, the petitioner, therefore, had the right to claim and obtain the advantage and benefit of the Limited Liability Act by pleading the same in his answer in the action pending in the state

court. The District Court denied Green's motion, and on appeal (*Green v. Langnes*, 35 F. (2d) 447), the Circuit Court of Appeals for the Ninth Circuit affirmed the District Court, saying:

> "If the injury occurred from negligence without the privity or knowledge of the owner of the vessel, he was entitled to limit his liability for the injury, to the value of the vessel, although there was only one claimant."

On certiorari this Court reversed the decisions of both lower courts, and approved the reasoning and procedure outlined by Judge Brawley in *The Lotta*, 150 Fed. 219. We quote the language of the Court with reference to the jurisdiction of the state courts:

> "* * * In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283, U. S. C., Title 46, Sec. 183) may be obtained by proper pleading.' The Lotta (D. C.) 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos (D. C.) 179 Fed. 756; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 260, 66 L. Ed. 927, 930, 42 S. Ct. 475. See also American S. B. Co. v. Chase, 16 Wall. 522, 532, 533, 21 L. Ed. 369, 372.
>
> "Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropri-

ate relief under the statute dealing with that subject. Compare Loughin v. McCaulley, 186 Pa. 517, 48 L. R. A. 33, 65 Am. St. Rep. 872,, 40 Atl. 1020."

Commenting on Judge Brawley's decision in *The Lotta*, this Court said:

"After referring to the provision of law saving to suitors the right of a common-law remedy, Judge Brawley said that the plaintiff had the right to pursue his remedy in the state court, unless the act providing for a limitation of liability clearly deprived him of it; that, where there was only a single claim, there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court; and that an answer setting up the limitation of liability would give the shipowner the relief to which he was entitled. It appearing there, as it appears here, that only one claim had been presented, and that the time fixed by the monition had expired, the court said (pages 222, 223, of 150 F.):

" 'The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that court as in this. In the ex parte proceedings here the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, the plaintiff is entitled to be heard on that question, and in the usual course of the common-law proceeding that issue can be fairly tried. * * *

" 'All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the

value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the state court, and if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here: for the act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.'

"Thereupon an order was entered dissolving the injunction against the prosecution of the action in the state court, but retaining the petition for a limitation of liability, for the reason, as the court said, that, 'if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question * * * and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability.' See, also, Delaware River Ferry Co. v. Amos (D. C.) 179 F. 755."

The restraining order was thereupon dissolved and the claimant, Green, was permitted to continue the prosecution of his action in the state court; and the shipowner, pursuant to the holding of this Court,

filed therein an amended answer pleading his right to a limitation of liability. The plaintiff, by his amended reply, however, challenged the *right* of the shipowner to a limitation of his liability by putting in issue the allegations of the answer, that the vessel was seaworthy and that plaintiff's injury was without the privity or knowledge of the owner. The shipowner thereupon obtained an order from the District Court enjoining the further prosecution of the action in the state court. The claimant then filed a motion in this Court asking leave to file a petition for a writ of mandamus against the District Court to show cause why the writ should not issue requiring the judge thereof to conform to the opinion in *Langnes v. Green, supra.* This Court denied the motion, but filed an opinion amplifying its former opinion (*Ex Parte Green*, 286 U. S. 437, 76 L. Ed. 1212), wherein it was further said in part:

> "It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jursidiction and dispose of the whole case. * * * *.
>
> "The district court, however, gave Green until a time fixed to withdraw, in the state court, the issue as to the right to limited liability, in which event the restraining order was not to issue. That court, upon being seasonably advised of the

> proceeding here and of our disposition of it, will, no doubt, grant further reasonable time to allow Green to elect whether to withdraw the admiralty issue which he has raised in the state court; and the denial of the motion is made without prejudice to such action."

Following the rendition of this opinion, the claimant withdrew his challenge to the shipowner's *right* to a limited liability, and the state court thereupon limited his liability to the value of the vessel.

We interpret *Langnes v. Green* and *Ex Parte Green*, *supra*, as holding that where there is only one possible claimant against the vessel, the owner desiring to limit his liability may avail himself of that right by proper pleading in the common law court, and that the common law court is perfectly competent to determine the value of the vessel where the *right* to limit liability is not denied, but is not competent to decide the issue where the *right* to limit liability is denied. Indeed, no other interpretation of this Honorable Court's opinion is possible without reading out of the opinion the following passages:

> "In a state court where there is only one possible claimant and one owner, the advantage of this section (the Limited Liability Act) may be obtained by proper pleading." * * * *
>
> "From the present record the necessary result of this holding is that the state court in the action there pending and in the due course of the exercise of its common law powers, is competent

to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject." * * * *

"The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel and that value may be determined as appropriately and as easily in that court as in this." * * *

"That the only questions to be decided there (in the state court), are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of the defendant's liability."

The only passage quoted by the Circuit Court of Appeals from this Honorable Court's opinion in either *Langnes v. Green* or *Ex Parte Green, supra*, is the following:

"It is clear from our opinion that the state court has no jurisdiction to determine the owner's right to a limited liability and that if the *value* of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case." (Ap. 57). (Italics ours).

Commenting on this, the Circuit Court of Appeals asks:

"In what way did the claimant 'accept' the *value* of the vessel as the limit of the owner's liability? He sought and secured a judgment for more than twice the *value* of the vessel, etc.

"The net result of these two decisions (*Langnes v. Green* and *Ex Parte Green*) is that the

> Supreme Court holds that the District Court sitting in admiralty has *exclusive* jurisdiction to determine all the questions involved in a proceeding for the limitation of liability." (Ap. 57). (Italics ours).

Obviously the Circuit Court of Appeals confused "value" and "valuation." This is plain not only from a careful reading of the passages just quoted, but also from the following record in the case: The petitioner's complaint in the state court alleged that the respondent was the "*owner*" of the "*Norco*," and nowhere in its answer did the respondent allege that it was merely a *charterer*, or plead the value of its charter and pending freight, or seek by a "proper pleading" to limit its liability to the value of the charter and the pending freight. Obviously, under these circumstances the petitioner neither could, nor did, challenge the respondent's *right to limit his liability*. Neither did he do anything else to deprive the state court of the jurisdiction which this Honorable Court has repeatedly said that it possessed to "afford him (the respondent) appropriate relief under the statute dealing with that subject." Indeed, the claimant did not even dispute he owner's *valuation* of the vessel, and the Circuit Court of Appeals was entirely incorrect even in stating that,

> "He (the petitioner) sought and secured a judgment for more than twice the value of the vessel,"

because, as stated, the value of the vessel had never even been suggested or referred to in the pleadings in the state court.

Having thus concluded that the jurisdiction of the District Court over all of these issues was *exclusive*, it followed as a matter of course that the state court had no jurisdiction, and it was entirely logical to conclude, as the Circuit Court of Appeals did, that the owner could not be required to litigate his rights in such a court, and could not be held to have waived any of his rights by his failure to do so. We repeat, however, that all of these conclusions, however logically one may flow from the other, are predicated upon the false premise that the state court lost jurisdiction when the claimant disputed the *valuation* which the owner placed on his vessel and her pending freight, even though he did not question his right to limit liability at all.

THE JUDGMENT OF THE STATE COURT IS RES JUDICATA OF RESPONDENT'S CLAIM TO A LIMITED LIABILITY

In support of its conclusion that the issue is not *res judicata* the Circuit Court of Appeals cites several cases, all decided prior to this Court's decision in *Langnes v. Green*, *supra*, where shipowners after judgments had been rendered against them in the

state courts invoked the jurisdiction of the federal courts to limit their liability. In the courts below we contended, and still do, that these decisions all assume that the state courts have no jurisdiction to entertain a shipowner's claim for limitation of liability; and that in none of them was the doctrine of *res judicata* raised. Indeed, this rule was not invoked in those cases for the precise reason that prior to *Langnes v. Green* it was quite generally believed that the state courts had no jurisdiction to limit a ship owner's liability. So many of the lower federal courts had held that the state courts are without jurisdiction to administer the Limited Liability Act that the Circuit Court of Appeals for the Ninth Circuit gave the question but very scant attention when presented in the *Langnes* case, 35 F. (2d) 447.

But this Court, in *Langnes v. Green, supra*, having determined that, in cases involving only one claim and one owner the state courts have jurisdiction to limit a shipowner's liability, the *res judicata* rule is inescapable.

> "*Matters Which Might Have Been Litigated*: A judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or *defeat* the claim, *but as to every other matter which might with propriety have been*

litigated and determined in that action. A party, therefore, must present in one action all the reasons, grounds and evidence which he may have in support of his claim or *defense.* * * * Again, if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject matter, he must avail himself of it, and whether an original party or an intervenor, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or *defense.*" 23 Cyc. 1170-1171. (Italics ours.)

In 2 Black on Judgments, Sec. 731, quoted in the footnotes at 23 Cyc. 1171, the author says:

> "The parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action, as well as all their evidence and all *necessary parts of their case or defense, on pain of being barred in a subsequent controversy.*"

The same rule has often been stated and applied by this Court in both civil and maritime causes. In *Grubb v. Public Utilities Commission*, 281 U. S. 470, 74 L. Ed. 972, 979, this Court said:

> "*The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.* Werlein v. New

Orleans, 177 U. S. 390, et seq., 44 L. Ed. 817, 820, 20 Sup. Ct. Rep. 682; United States v. California & O. Land Co., 192 U. S. 355, 358, 48 L. Ed. 476, 478, 24 Sup. Ct. Rep. 266.

"*As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.* Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 319, 71 L. Ed. 1069, 1071, 47 Sup. Ct. Rep. 600; United States v. Moser, 266 U. S. 236, 241, 69 L. Ed. 262, 264; 45 Sup. Ct. Rep. 66; Cromwell v. Sac. County, 94 U. S. 351, 352, 24 L. Ed. 195, 197." (Italics ours.)

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069, a seaman who was injured by the fall of a strongback and suffered amputation of his leg, filed a libel in admiralty, alleging that the injury was caused by unseaworthiness and insufficiency of the gear and tackle employed on the vessel. After a trial, the district court held that the accident was not due to the matters alleged, but to the grossly negligent way in which dunnage was taken out of the hold, and that under the decisions no recovery could be had for damages upon that ground. Subsequently, the plaintiff brought an action in the state courts of New York pursuant to the Merchant Marine Act, alleging negligence on the part of the agents and employees of the

shipowner in the control and operation of the vessel and its appliances. The shipowner answered, claiming among other things that the decree in the admiralty case was *res judicata*. This plea was overruled and a trial resulted in a verdict and judgment for the plaintiff. On writ of certiorari this Court held the decree in the admiralty case was a bar to the common-law action, and that the matter was *res judicata*. In so holding, the Court said:

> "The same general doctrine is stated in Stark v. Starr, 94 U. S. 477, 485, 24 L. Ed. 276, 278, that 'a party seeking to enforce a claim, legal or equitable, must present to the court, either by pleading or proof, or both, all of the grounds upon which he expects a judgment in his favor. *He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissable.*' * * * The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury (citing numerous cases).
>
> *"The conclusion that the judgment below must be reversed cannot be avoided without subverting the long established principles of general application, which we are not at liberty to set aside for a special case of hardship."* (Italics ours.)

If this is a fair rule, it must work both ways. In that case, it was applied to the benefit of the shipowner and to the detriment of the seaman. In the case at bar, the shipowner should not be permitted to escape on the ground of "hardship."

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927, *supra*, was an action by a seaman against his employer, a shipowner, commenced in the state court, to recover damages for personal injuries. There was only one possible claimant and one owner. The shipowner did not plead in his answer his right to a limitation of liability, but raised the question for the first time by requesting the trial court to instruct the jury that its verdict could not exceed the value of the vessel. In holding that the right to a limited liability was asserted too late, this Court said:

> "Petitioner asked an instruction that Section 4283 of the Revised Statutes (Comp. Stat. Sec. 8021, 6 Fed. Stat. Anno., 2nd ed., p. 336) applied, and that under it, the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading: The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours.)

If a shipowner cannot claim the right to a limited liability for the first time upon a request for a charge to the jury, it is certainly too late to make such claim after the entry of judgment.

Although *Carlisle Packing Co. v. Sandanger, supra,* was quoted with approval by this Court in *Langnes v. Green* and your petitioner relied upon it in the court below, it was not mentioned in the opinion of the Circuit Court of Appeals.

Where, as in the present case, a shipowner's right to a limitation is not, and cannot, be questioned and, therefore, a remedy is available in the state court, he should not be permitted to institute an independent proceeding in the federal district court at any time, either before or after judgment. If such a practice were sanctioned by this Court there would, indeed, be no end to litigation in cases of this kind. A shipowner or charterer could litigate his liability to the highest court of the state, and if judgment went against him, he could then ask this Court to review the case, and, if still unsuccessful, he could then commence the litigation anew by filing his petition for limitation of liability in the federal district court.

Such practice would not only encourage multiplicity of suits, contrary to the policy of the law, but it would unjustly compel seamen to assume the great expense

incident to a limitation proceeding in the federal court. This is forcefully pointed out by Judge Brown in *The Eureka No. 32*, 108 Fed. 672, cited as authority in *The Lotta, supra*, the reasoning of which in turn has been approved by this Court:

> "One other incident of the independent proceeding under Section 4284 and Rule 55, that operates still further to the prejudice of the injured party, is that the costs and expenses of the proceeding are to be allowed to the shipowner. Thus a fund, already insufficient to make good the injured party's honest demand, is still further depleted by a cumbrous and expensive proceeding. These costs are (a) for a long and costly advertisement calling for imaginary claims having no existence; (b) a commissioner to take proof and report upon these imaginary claims, never to be presented; (c) the appointment of a trustee to take charge of the ship or its proceeds in order to provide for an imaginary pro rata distribution, which will never arise; and, finally, for the other statutory charges in the fee bill, in a proceeding wholly unnecessary and of no benefit to anyone except the shipowner, to enable him to escape a jury trial."

CONCLUSION

In conclusion, it is respectfully submitted that the state court had jurisdiction and was in every respect competent to grant the respondent the relief which it now seeks in the federal court; that the judgment of the state court on the merits is now *res judicata* of the

issue; and, therefore, that the petition for writ of certiorari in this case should be granted.

Respectfully submitted,

GEORGE F. VANDERVEER,
SAMUEL B. BASSETT,
Proctors for Petitioner.

Supreme Court of the United States

October Term 1933

No. 614

CHRIS LARSEN, PETITIONER

vs.

NORTHLAND TRANSPORTATION CO., A CORPORATION, CHARTERER OF THE AMERICAN MOTOR VESSEL "*NORCO*," RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioner

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CHRIS LARSEN, PETITIONER

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NORTHLAND TRANSPORTATION CO., A CORPORATION, CHARTERER OF THE AMERICAN MOTOR VESSEL "*NORCO*," RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioner

PREFATORY STATEMENT

In this case a writ of *certiorari* was granted (54 Supreme Court Reporter, 373) to review the decision of the United States Circuit Court of Appeals for the 9th Circuit (66 F. (2d) 651, R. 53-60). The petitioner has not filed a new opening brief, and in view of the elaborate brief submitted by the respondent in

opposition to the petition for writ of *certiorari*, it is believed respondent will not submit any further brief on the merits. The purpose of the present brief is to make reply to respondent's brief in opposition.

STATEMENT OF THE CASE

A complete statement of the case will be found in the Petition for Writ of Certiorari. (Pp. 1-4). It is only necessary here to emphasize those facts which relate strictly to the principle of *res judicata*.

The petitioner's Complaint, in the State Court, alleged that the respondent "was the *owner of and operated* the United States Motorship 'Norco,'" and that it employed the petitioner aboard said vessel as an able seaman. (R. 19-20). The respondent by its Answer "denied each and every allegation therein (Complaint) contained," and nowhere alleged that it was merely the *charterer* and not the *owner* of the "Norco"; nor did respondent plead its right to a limitation of liability as a partial defense. (R. 23-24). After judgment was entered in the State Court, the respondent filed its petition for limitation of liability in the Federal District Court, alleging that it was not the *owner*, but merely the *charterer* of the "Norco," and that by reason thereof the value of its interest in the ship did not exceed $4,651,98, which included $3,856.00, "freight and passenger monies pending on said *voyage*." (R. 3-5).

ARGUMENT

I.

RESPONDENT'S AUTHORITIES

Apparently conceding that the State Court had jurisdiction and was competent to determine the value of the respondent's interest in the vessel and its pending freight, and to limit its liability accordingly, respondent nevertheless contends that it was not required to submit that issue to the State Court, but had a right to wait until its liability had been determined in the common law action, and then apply to the Federal Court for a limitation of that liability. Prior to *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, and *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212, this contention would have been plausible, and the decisions of inferior federal courts cited by the respondent under the caption "Limitation of Liability May Be Had After Trial on Merits" (Brief, 11-27) would undoubtedly have sustained the argument. But, whatever may have been the opinion of those courts, the question of the State Court's jurisdiction and competency has now been set at rest by the decisions of this Court in *Langnes v. Green*, and *Ex Parte Green, supra*. As was said by Circuit Judge Learned Hand in *In re Putnam*, 55 F. (2d) 73 (1932):

> "Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, modified what had theretofore been supposed to be the effect of *White v. Island Transportation Co.*, 233 U. S. 346, 34 S. Ct. 589, 58 L. Ed. 993, by holding that, while a petition for limitation might be filed against a single claim and held in terrorem, ordinarily no injunction would go to prevent an action elsewhere."

Because those decisions clearly establish the jurisdiction of the State Courts to limit a shipowner's liability, it can no longer be contended that a shipowner may limit his liability in the Federal Court after judgment in the State Court.

A careful analysis of the cases (cited by respondent) decided by the lower federal courts prior to *Langnes v. Green* will show that in none of them was the question presented whether, upon the ship owner's failure to claim the benefit of the limited liability act in the State Court; the matter became *res judicata*. These cases, antedating the *Langnes* case, all assumed, where it was not expressly stated, that "state courts are impotent to administer the limited liability act" and that "state courts have not the requisite jurisdiction." Several of them involved more than one claim, or more than one owner, or both, under which circumstances the State Court, manifestly, was not competent, even under *Langnes v. Green*, to afford the shipowner appropriate relief.

The Benefactor, 103 U. S. 239, 26 L. Ed. 355 (1880), the only decision of this Court cited by respondent, was a collision case. The opinion states that two libels were filed, one for damage to the Schooner Susan Wright, and one by the crew, undoubtedly for personal injuries and property losses. Moreover, in that case, no action had been commenced in the State Court, and, therefore, the plaintiff's right to a trial by jury was not involved; and the doctrine of *res judicata* was not even mentioned.

In *The S. A. McCaulley*, 99 Fed. 302 (1899), some of the *several owners* of the ship petitioned in the Federal Court for a limitation of their liability, and the Court expressly stated:

> "The State Court does not possess the machinery to administer the Act of Congress, *even in cases where there is only one claimant.*" (Italics ours).

In re Old Dominion S. S. Co., 115 Fed. 845 (1902), involved *several claims.* The Court said that, if the petition for limitation of liability had been filed in the District Court before the trial in the State Court, *all of the issues would necessarily have been determined in the limitation proceeding*, and held:

> "The jurisdiction of this Court in such cases is ample and complete—it is absolute."

A careful study of *Gleason v. Duffy*, 116 Fed. 298 (1902), will disclose that the case involved many

claims and several owners. One of the claimants sued at common law in the State Court of Indiana. The owners, in their answer, had claimed the benefit of the Limited Liability Act, but the trial court had rejected the plea and this ruling had been affirmed by the Supreme Court of Indiana. In this situation, even under the *Langnes Case*, a shipowner had an absolute right to invoke the jurisdiction of the Federal Court. Furthermore, in the course of its opinion, the District Court observed that, if the petition had been filed before trial in the State Court, both the question of the shipowner's liability and limitation thereof could have been determined in the Federal Court.

In *The Ocean Spray*, 117 Fed. 971 (1902), no claim was made that the shipowner could have limited his liability in the State Court; the claimant excepted to the petition on the sole ground of *laches*. It was assumed, both by the Court and counsel, that the Federal Court had exclusive jurisdiction to administer the Limited Liability Act.

In re Starin, 124 Fed. 101 (1903), the Court held that the shipowner had not *waived* has right to limit his liability in the Federal Court by failing to claim that right in the State Court. No authority whatever is cited in support of that holding, nor is any

reason stated in support of the conclusion. The doctrine of *res judicata* is not mentioned. It is, therefore, only fair to say that the Court assumed, as the other courts had in the preceding cases, that the state courts are not competent to afford the shipowner a remedy under the Limitation Act. The "waiver" discussed plainly is one arising from *laches* in not sooner bringing the entire controversy to the Federal Court.

The City of Boston, 159 Fed. 257 (1906), was another collision case involving more than one claim. (See same case at 159 Fed. 261, where the facts are stated in subsequent proceedings.) Two of the claimants, husband and wife, had sued in the State Court and, after a verdict in their favor and the denial of a motion for a new trial, a petition for limitation of liability was filed. The District Court enjoined all further proceedings in the State Court and *took jurisdiction of the entire controversy,* and thereafter held that the shipowner was not liable for the damages claimed (159 Fed. 261.) *The Court held there was no waiver by reason of laches.* The doctrine of *res judicata* was not invoked, and the opinion, plainly, assumes that the State Court had no jurisdiction to afford a shipowner a remedy under the Limited Liability Act.

The Hoffmans, 171 Fed. 455 (1909), expressly holds that state courts are impotent to afford a shipowner adequate relief, even in cases involving single claims. The Court rejects the reasoning and procedure outlined in *The Lotta*, 150 Fed. 219, which has now been approved by this Court in the *Langnes Case*. That Court also points out the contrariety of judicial opinion which existed at that time, and elects to follow *In re Starin*, *The S. A. McCaulley*, and others cited by counsel, rather than *The Lotta*, *supra*.

In re P. Sanford Ross, 196 Fed. 921 (D. C. N. Y. 1912), a petition for limitation of liability was filed after plaintiff had obtained a *verdict* in the State Court. It was not claimed that the shipowner should have pleaded his right to a limitation of liability as a defense in the State Court, but simply contended *that the tort involved was not a maritime tort* and, therefore, the Admiralty Court had no jurisdiction. This was the only question decided.

Monongahela River Coal & Coke Co. v. Hurst, 200 Fed. 711 (C. C. A. 6, 1912), was another *collision case, involving several claims*, which had been commenced and tried in a court of admiralty. The petition for limitation of liability was filed in the same court after decrees adjudicating liability had been affirmed on appeals. The Court held that, although the shipowner had a right to claim the benefit of the

Limited Liability Act directly in the collision suits, he was not bound to do so, but could claim a limitation after liability had been adjudicated. Since the claimants (plaintiffs) were not deprived of the right to a trial by jury, or any other right, the owner's delay in invoking his right to a limitation of liability was not deemed to constitute *laches* barring a limitation of his liability.

In *The Defender*, 214 Fed. 316 (D. C. Wash. 1914), the petition for limitation of liability was filed in the District Court after liability in an action *in rem* had been established in the same forum. Again, plaintiff's right to trial by jury was not involved, and the Court merely held:

> "The exception, because of complaint's *laches*, is overruled."

The T. W. Wellington, 235 Fed. 728 (D. C. N. Y., 1916), is another case which assumes that the Federal Courts have exclusive jurisdiction to limit a shipowner's liability, even in cases involving single claims. The right of a shipowner to plead limited liability in the State Court is not discussed and, therefore, the doctrine of *res judicata* is not mentioned.

In *Strong v. Holmes*, 238 Fed. 554 (C. C. A. 9, 1916), the claimant contended that the shipowner had *no right to a limitation of liability* because only one claim was involved—*not that the issue was res*

judicata, because the shipowner had failed to plead it in the common-law action. The District Court dismissed the petition "for want of jurisdiction," and the Circuit Court of Appeals said:

> "It is suggested that the libel or petition was not filed in time; but we think otherwise. The Benefactor, 103 U. S. 239, 26 L. Ed. 351.
>
> "It is also urged that there is only one claimant * * * but the fact that there is but one claim is immaterial. White v. Island Transportation Co., 233 U. S. 346, 34 S. Ct. 589, 58 L. Ed. 993. * * *."

Manifestly, the Court assumed, on the authority of *White v. Island Transportation Co., supra*, that the Federal Court had exclusive jurisdiction to limit a shipowner's liability in *all cases*, and that is precisely what that Court subsequently held in *Green v. Langnes*, 35 F. (2d) 447, which this Court reversed.

Societe Napthes Transports v. Bisso Towboat Co., 241 Fed. 463 (C. C. A. 5, 1917), was a collision case nivolving a *libel* for damages to a vessel. The right to a jury trial in the State Court was not involved and, for this reason alone, the case is not in point.

In *The Ethelstan*, 246 Fed. 187 (D. C. Fla., 1917), a petition for limitation of liability was filed after a decree *in rem* had been entered in the same court. The Court held that the shipowner's failure to assert his right to a limitation of liability before the decree

was entered did not constitute a *waiver*. As above stated, with reference to other cases analyzed, this merely involved the application of the doctrine of *laches*, and not *res judicata*, or the right of a litigant to trial by jury in a common-law court.

In *The Victor*, 1 F. Supp. 931 (D. C. N. Y., 1927), it was not claimed that the shipowner should have pleaded his right to a limitation of liability in the State Court. This is another case where it was assumed that state courts are powerless to administer the Limited Liability Act.

The only case cited by the respondent decided since the *Langnes Case is, In re Moran Bros. Contracting Co.*, 1 F. Supp. 932 (D. C. N. Y., 1932). Except for the fact that the doctrine of *res judicata* was not invoked or discussed therein, the case apparently presents the identical question involved in this appeal. For this reason we wish to analyze this decision somewhat in detail. After briefly stating the facts, Judge Campbell there said:

> "No issue of the right of the petitioner to limit liability was tendered or decided in the state court, and the petitioner lost no rights thereby."

and disposed of the case in *four very brief paragraphs*, consisting *of exactly five sentences*. We quote these paragraphs and discuss them separately as presented:

"(1) While under Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, the state court is competent to entertain a claim of the shipowner for a limitation of liability, and to afford him appropriate relief, the shipowner was not bound to seek that relief in the state court, but was free to invoke the jurisdiction of this court. In other words, where there is but a single claim on which *the claimant can choose his own forum to try the issue of liability, the shipowner can choose his own forum to try the issue of his right to limit that liability.*" (Italics ours).

This statement is not sound, for the following reasons:

1. It was not the intention of the Limited Liability Act to give a shipowner a *choice of forums.* In the *Aquitania* 20 F. (2d) 457, (C. C. A. 2), the Court said:

"The statute is intended to limit the liability of the shipowner, but not arbitrarily to give him a particular forum. * * *. All that could be accomplished by appellant (petitioner), if successful on this petition, would be to avoid jury trials. It would be permitting it to try the case in another forum of its choice and this is unauthorized by the Act."

See also: The *Tug No. 16*, 236 Fed. 405, 406.

In the *Langnes Case*, this Court quoted with approval the following from *The Lotta*:

"All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in The Lotta and her freight. There

> is no reason to doubt that this proper defense may be availed of in the state court, *and if there is any ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the Act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.*" (Italics ours).

In re Putnam, 55 F. (2d) 73 (C. C. A. 2, 1932), the shipowner filed a petition for limitation of liability in the District Court, before the administratrix of a deceased seaman commenced her action in the state court, attempting thereby to deprive her of a jury trial. She moved to vacate the injunction, alleging that no other claims could arise from the accident, which was admitted. "The District Court denied this motion on the ground that the limitation proceedings were an earlier exercise of jurisdiction which excluded that of any other court." In reversing the District Court and vacating the injunction, the Circuit Court, after referring to *Langnes v. Green*, said:

> "* * * The single claimant had there (Langnes v. Green) already commenced an action, and this is the only ground for distinguishing the case at bar. Both District Judges thought this difference critical, adopting the view that limita-

tion proceedings were *in rem*, and that the case was an instance of the familiar doctrine that the jurisdiction of the earlier court, in a suit involving custody over a *res*, is exclusive. The only question for us is whether this is correct.

"We think that it is not. * * * When there is but a single possible claim, a contrary result would only remove the case from the tribunal properly vested with jurisdiction; in short, avoid a jury trial. The statute intended nothing of the sort, and the effort is to be discountenanced.

"It follows * * * that the injunction should be vacated."

In the case at bar, instead of anticipating the claimant's action, the shipowner is attempting to avoid a jury trial on one of the vital issues, by waiting until after liability has been adjudicated in the State Court, and this effort should likewise be "discountenanced."

2. While Judge Campbell concedes that, under the *Langnes Case*, the claimant can "choose his own forum" to try *the issue of liability*, he says nothing concerning the claimant's right to choose his own forum to try the issue of the *value of the vessel and her freight pending*. This issue is just as important to the claimant as is the issue of *liability*, and this Court in the *Langnes Case* has very plainly held that the claimant is entitled to submit both of these issues to the jury. The Court quoted as follows from *The Lotta*:

"The owner of the vessel, therefore, can by answer in the State Court, set up as a defense that he is not liable beyond the value of the vessel, *and that value can be determined as appropriately and as easily in that court as in this.* In the ex parte proceedings here, the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, *the plaintiff is entitled to be heard on that question, and, in the usual course of common-law proceeding, that issue can be fairly tried.* * * * and that the only questions to be decided there (state court) are, first, whether the defendant is liable at all, and, if so, *as to the value of the vessel* and her freight, which is the limit of the defendant's liability." (Italics ours).

The foregoing quotation from *The Lotta* is repeated in *Ex Parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212. Judge Campbell apparently has overlooked this very important point.

The second paragraph of Judge Campbell's opinion is as follows:

"This Court has jurisdiction, and should entertain a petition to limit liability after a trial of the *issues of liability* and to restrain further proceedings in the common law court, or execution on the judgment or decree obtained. The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Victor (D. C.), 1 F. Supp. 931, 1927, A. M. C. 1121; In re Starin (D. C.), 124 F. 101; The T. W. Wellington (D. C.), 235 F. 728." (Italics ours).

It will be noted that the cases cited in support of this proposition (all of which we have analyzed above)

were all decided before the *Langnes Case*. Here, again, Judge Campbell speaks only of the *issue of liability*, and ignores the issue of the *value of the vessel and her freight pending*.

The third paragraph of his opinion holds:

> "No laches has been shown, as the shipowner was not required to claim limitation until a liability on its part was established."

The question is not one of *laches*, but plainly involves the doctrine of *res judicata*. Judge Campbell concedes that under the *Langnes Case*,

> "* * * the state court is competent to entertain a claim of the shipowner for limitation of liability, and to afford him appropriate relief, * * *"

If thit be true, application of the doctrine of *res judicata is inescapable*. The opinion, however, does not discuss it.

As stated by Judge Neterer in the opinion filed herein (R. 30), 1 F. Supp. 932, 933-934:

> "The state court being competent to give common-law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could with propriety have been determined in that suit, it was his duty to plead limitation of liability, if any, to the value of his interest in the ship. An adequate remedy was available and not put forward, and escape from the judgment

which followed cannot be made (citing cases). The judgment upon the merits is res judicata, not only as to the issue presented, but also to rights and issues which might have been presented. (Citing cases).

"The petitioner was not at liberty to present his defense by piece-meal and litigate the liability in the state court. (Citing cases)."

Judge Campbell's statement that "The shipowner was not required to claim limitation until liability on its part was established," is squarely in conflict with the holdings of this Court in the *Langnes Case* and in *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927. In the latter case, the Court said:

"Petitioner asked an instruction that Section 4283 of the Revised Statutes (Comp. Stat. Sec. 8021, 6 Fed. Stat. Annot., 2nd Ed., p. 336) applied, and that, under it, the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours).

Although the foregoing quotation is quoted with approval by the court in the *Langnes Case*, Judge Campbell's opinion utterly ignores it.

The fourth and concluding paragraph of Judge Campbell's opinion is as follows:

> "The judgment in the state court, of course, establishes the amount of the claimant's damage, but does not determine the issue of the shipowner's right to limit, and no authority is cited, nor that I have found, which *required* the shipowner to litigate his *right to limitation of liability in the state court.*" (Italics ours).

Of course the plaintiff in the State Court must confess the shipowner's *right* to a limitation of liability. If he challenges that right, the action in the State Court will be enjoined and the entire controversy will be brought to the Federal Court, because that Court has exclusive jurisdiction to determine whether a shipowner is entitled to a limitation of his liability. *Ex Parte Green.* On the other hand, in a State Court, it is the duty of a shipowner to plead, as a partial defense, his right to a limited liability, alleging the value of the vessel, or his interest therein; and when he has done this the claimant is then called upon to admit the shipowner's *right* to a limitation, and the value of the vessel, if disputed, thus becomes a question of fact to be determined by the jury. This, plainly, is the holding of the Court in the *Carlisle Packing Co.* and *Langnes* cases, *supra.*

II.

RES JUDICATA

Since it is now settled that both the federal and state courts have jurisdiction, and are competent, to administer the Limited Liability Act in cases involving a single claim, there is no sound reason why the shipowner should be permitted to institute an independent proceeding in the federal courts for a limitation of liability, unless and until his right to limitation has been challenged in the State Court. Where, as in the case at bar, the shipowner or charterer could have asserted his right to a limited liability in the State Court, but failed to do so, the matter must be deemed *res judicata*. We believe the argument and authorities cited in Petitioner's Brief in support of the Writ (Pp. 29-36) amply sustain this proposition.

The respondent argues, however, (Brief, 37) that our position in this regard is based upon a false assumption. It is there said:

> "This assertion assumes a situation which is not here presented, namely, that if respondent had claimed a limitation of liability in the state court, the petitioner would have confessed the right to limitation, as otherwise the state court would have had no jurisdiction to determine respondent's right to limitation of liability."

If the respondent had claimed the right to a limited liability in the state court, the petitioner could not

have denied it, because it appeared on the face of his complaint (R. 20-21) that the negligence upon which the respondent's liability was predicated was that of a fellow servant (winchman), concerning which the respondent, manifestly, could have had no "privity or knowledge." In other words, the allegations of the petitioner's complaint amounted to a confession that the cause of his injury was *without the privity or knowledge of the respondent*, which entitled respondent to limitation of liability.

In this situation, if limitation had been claimed, any judgment entered against the respondent would necessarily have been limited to the value of its interest in the vessel as determined by the jury.

But apart from this, we believe the necessary result of the *Carlisle Packing Co.* and *Langnes* cases, *supra*, to be that the shipowner (before invoking the jurisdiction of the federal courts) is required to plead his right to a limited liability as a defense, and thus give the claimant an opportunity to confess the right.

The respondent's argument relating to the principle of *res judicata* is based entirely upon the assumption that the right to a limitation of liability "is not a defense to petitioner's claim." (Brief, 39). But this Court has definitely held that in a state court, where

there is only one possible claimant and one owner, the shipowner's right to a limitation of liability *is a defense*, which must be pleaded by way of answer to the plaintiff's complaint.

In *Carlisle Packing Co. v. Sandanger, supra*, the Court said:

> "In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. The Lotta, 150 Fed. 219, 222; Delaware River Ferry Co. v. Amos, 179 Fed. 756. *Here, the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury.*" (Italics ours).

Quoting from "*The Lotta*" the Court further said in the *Langnes Case*:

> "The owner of the vessel, therefore, can by *answer* in the state court set up as a *defense* that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that Court as in this.
>
> * * * "There is no reason to doubt that this *proper defense* may be availed of in the state court, and if there is an ulterior purpose, and petioner's object in invoking the jurisdiction of this Court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this Court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the

common-law is competent to give it, and good faith requires that this proviso shall have its full and fair effect." (Italics ours.)

For these reasons it is not deemed necessary to analyze and distinguish the authorities cited by the respondent on this point.

III.

ISSUES ADJUDICATED BY THE JUDGMENT OF THE STATE COURT

As already stated, the petitioner in his complaint alleged that the respondent was the *owner* of the "Norco". (R. 19.) The respondent in its answer denied this allegation of *ownership*. (R. 23.) It thus appears from the pleadings in the state court that the *ownership* of the vessel was an issue in the case, and the state court having rendered judgment in petitioner's favor, that issue must be deemed *res judicata*; and the respondent cannot now be heard to say, as alleged in its petition for limitation of liability, that it was only the *charterer* of the vessel. This Court will not go behind the judgment of the state court to determine whether there was sufficient evidence to support the finding of the state court that the respondent was the owner. (This is elementary law and requires no citation of authority.) And, since it appears on

the face of the respondent's petition for limitation of liability that its interest in the vessel, as alleged *charterer*, amounted to $4651.98, all except $795.98 of which constituted "freight and passenger monies pending *on said voyage*," (R. 4-5), for obvious reasons, it must be assumed that the value of respondent's interest as the *owner*, exceeds the amount of petitioner's judgment by many thousands of dollars. Under these circumstances, a petition for limitation of liability cannot be sustained. *The Aquitania*, 20 F. (2d) 457, *supra*.

This being an admiralty proceeding which is tried *de novo*, the Court is not limited to a consideration of the grounds upon which either of the courts below rested their judgments, but will direct the proper judgment which should have been rendered on the record then before those courts. In *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, *supra*, the Court said with reference to this matter:

> "The question then arises: What is the scope of inquiry in this Court when the case is brought up by certiorari from the Circuit Court of Appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but 'must enter the judgment which should have been rendered by the Court below on the record then before it.' Baker v. Warner, 231 U. S. 588, 593, 34 S. Ct. 175, 177, 58 L. Ed. 384. And in Delk v. St. Louis & San

> Francisco R. R., 220 U. S. 580, 588, 31 S. Ct. 617, 55 L. Ed. 590, following Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267, 30 S. Ct. 505, 54 L. Ed. 757, it was held that on certiorari, likewise, the entire record is before this Court with power to review the action of the Court of Appeals and direct such disposition of the case as that Court might have done upon the writ of error sued out for the review of the Circuit (now District) Court. In Watts, Watts & Co. v. Unione Austriaca, etc., 248 U. S. 9, 21, 39 S. Ct. 1, 2, 63 L. Ed. 100, 3 A. L. R. 323, it was said that: 'This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require'; and 'the rule is the more insistent, because in admiralty cases are tried de novo on appeal.' See, also, Dorchy v. Kansas, 264 U. S. 286, 289, 44 S. Ct. 323, 68 L. Ed. 686."

It is therefore submitted that, in any event, the judgment of the District Court dismissing the respondent's petition should be reinstated, not only on the grounds sustained by the district judge, but on the further ground that it has been adjudicated by the judgment of the state court that the respondent is the owner of the "Norco", and the value of the vessel appears to greatly exceed the amount of petitioner's judgment.

There is still another valid reason why the judgment of the Circuit Court of Appeals should be reversed and that of the District Court reinstated. In its petition for limitation of liability the respondent

alleges that it is the charterer and operator of the "Norco" and that it "*manned, victualed and navigated said vessel at its own expense.*" (R. 3.) Title 46 U. S. C. A., so far as material to the question now under consideration, provides as follows:

> . . Section 183. "The liability of the owner of any vessel for any * * * act, matter, or thing, loss, damage, * * * done, occasioned, or incurred without the privity or knowledge of such owner * * * shall in no case exceed the amount or value o fthe interest of such owner in such vessel, and her freight then pending."
>
> Section 186. "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel, within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; *and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.*"

(On page 7 of its brief the respondent quotes Section 186 but omits the last clause thereof which we have italicized and which is pertinent to the present inquiry). It will be noted that by the plain and unambiguous language of Section 186 a charterer of a vessel who mans, victuals and navigates it at his own expense is deemed the owner of the vessel within the meaning of the Limited Liability Act and he is liable in the same manner and to the same extent as though he were the owner of the vessel. The respondent's pe-

tition for limitation of liability alleges that it is such charterer as is describd in Section 186; and since it appears, inferentially, from other allegations of respondent's petition that the value of the vessel greatly exceeds the amount of petitioner's judgment, the petition for limitation must be dismissed. We have not been able to find any decision of this Court which passes directly on the question now under consideration nor any other decision which is squarely in point except that of Judge Kerrigan, District Judge of the Northern District of California, in the recent case of *Spencer v. Beadle S. S. Co.* (unreported so far as we know). We are advised by Spencer's Proctor, Mr. A. Don Duncan, Russ Building, San Francisco, California, that Judge Kerrigan, in that case, held: "the charterer is liable for the entire value of the vessel." A copy of Judge Kerrigan's memorandum opinion, as furnished us by Mr. Duncan, is as follows:

> "The governing statute is Sec. 186 of Title 46 U. S. C. A. which provides:
>
> " 'The charterer of any vessel, in case he shall man, vitual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of such vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.'
>
> "It would seem apparent from the last clause that the vessel or its value is the measure of the

charterer's liability. Were it not for this statute the charterer would be liable for the full amount of the judgment against him. The effect of the statute is to enable him to limit his liability provided he does as the owner is required to do under Sec. 183 of the same title. He must surrender the vessel or its value. It has been held that, under the provisions of this section, the charterer as the owner pro hac vice, and not the owner is the party responsible for the torts of the vessel. Thorp v. Hammond, 12 Wall. 408: 'The Barnstable', 181 U. S. 464; see 'The Elfrida', 14 Fed. (2nd) 237. Furthermore, the charterer's interest in the vessel is contractual and consists merely in the right to use it under the terms and conditions of the charter party. He has nothing commonly regarded as an interest in the ship. If then, petitioner's contention were adopted, one having a claim recoverable to the extent of the value of the vessel had it been operated by the owner, would be limited to the recovery of the nominal interest of the charterer and the freight, and at the same time would have no right of action against the owner. Such a construction is not warranted by the language of the statute and its adoption would practically nullify the right of recovery of any sizable claim falling within the limitation statutes where the vessel is chartered. It is my view that the charterer is the owner pro hac vice and must surrender the vessel and freight pending at the end of the voyage or its value."

In view of the plain terms of the statute and the decisions of this Court cited in the opinion, it is difficult to understand how Judge Kerrigan could have arrived at any other conclusion.

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the Circuit Court of Appeals is erroneous and should be reversed and that the judgment of the District Court dismissing respondent's petition for limitation of liability should be reinstated.

Respectfully submitted,

GEORGE F. VANDERVEER,
SAMUEL B. BASSETT,
Proctors for Petitioner.

IN THE

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1953

No. 614

CHRIS LARSEN,
Petitioner

vs.

NORTHLAND TRANSPORTATION CO., a Corporation,
Charterer of the American Motor Vessel, "NORCO,"
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
CLAUDE E. WAKEFIELD,
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IN THE
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OCTOBER TERM, 1933

No. 614

CHRIS LARSEN,
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NORTHLAND TRANSPORTATION CO., a Corporation,
Charterer of the American Motor Vessel, "NORCO,"
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a petition for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review its decision (66 F. (2d) 651, Ap. 53) reversing on appeal an order of the District Court for the Western District of Washington, Northern Division, dismissing a petition for limitation of liability (Ap. 32) on demurrer and motion to dismiss filed against the same (Ap. 17).

The petition for limitation of liability was filed on October 1, 1932, and alleges: that the petitioner, Northland Transportation Co., a corporation (respondent here), was the charterer and operator of the American Motor

Vessel "NORCO," and manned, victualed and navigated said vessel at its own expense, of which said vessel the Citizens Light, Power & Water Co., a corporation, was the owner; that on or about July 20, 1931, the vessel commenced loading at the Port of Seattle for a voyage to the Port of Juneau, Alaska, and thereafter sailed on said voyage, which terminated at said Port of Juneau on July 25, 1931, being the voyage in connection with which the petitioner seeks limitation of liability; that Chris Larsen (petitioner here), was a seaman employed as a member of the crew of said vessel on said voyage and on July 20, 1931, while said vessel was loading at the Port of Seattle, said Chris Larsen, while engaged in loading said vessel as a member of the crew thereof, suffered personal injuries thereon, resulting in the institution of an action by said Chris Larsen, as plaintiff, against the petitioner, as defendant, in the Superior Court of the State of Washington for King County, in which said action recovery in the sum of $25,000.00 was sought by reason of the alleged negligence of the winchdriver on said vessel going ahead with great speed on the winches, causing a strongback, which had become attached to board slings which were being moved, to strike said Chris Larsen and throw him through an open hatchway to the 'tween deck; that in said action a verdict of a jury was rendered on September 27, 1932, in favor of said Chris Larsen and against the petitioner in the sum of $12,500.00, and a judgment entered thereon on October 1, 1932, in the sum of $12,500.00, interest and costs, which said judgment remains wholly unsatisfied (Ap. 2).

The petition for limitation of liability then continues

with the additional and usual allegations entitling the petitioner to a limitation of liability and prays for relief accordingly. There was filed with the petition for limitation of liability affidavits of value, and pursuant to orders therefor an ad interim stipulation was filed and approved and monition and citation issued and due service thereof had (Ap. 1).

On October 8, 1932, the petitioner, Chris Larsen, filed exceptions to the petition for limitation of liability (Ap. 16) and a demurrer and motion to dismiss the same (Ap. 17), together with an affidavit, to which is attached the complaint, answer and reply in the state court action (being all of the pleadings therein), (Ap. 18).

The grounds alleged in support of the demurrer and motion to dismiss are as follows:

> "1. That said petition does not state facts sufficient to entitle the petitioner to limitation of its liability.
>
> "2. That there is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and obtained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County.
>
> "3. That the petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to claim and obtain the advantage and benefit of said statute" (Ap. 17).

This being substantially the same as the grounds alleged in support of the exceptions (Ap. 16).

The district court in entering its order of dismissal concluded that respondent, by failure to make any claim

in the state court of its right to limit its liability, waived such right, and that all matters pertaining to the merits of the state court action, including the right to limitation of liability, were fully adjudicated (Ap. 33).

It should be pointed out that the fact there were no additional claims to be asserted arising on the voyage did not appear until after petitioner obtained his judgment and monition had been issued in the limitation proceedings (Ap. 33).

DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In reversing the order of the district court dismissing the petition for limitation of liability and remanding the cause for further proceedings in accordance with its opinion (Ap. 61), the Circuit Court of Appeals, speaking through Wilbur, Circuit Judge, said in part:

> "It has been held in many instances by district courts sitting in admiralty and by circuit courts of appeals reviewing those decisions that the right of the owner to limit his liability is in no wise affected by the fact that the claim against him had been prosecuted to judgment in a common law court and that a judgment had been rendered in that court for the full amount of the injury without reference therein to the limitation of the owner's liability as provided by federal law. *S. A. McCaully* (D. C.), 99 Fed. 302; *Re Old Dominion* (D. C.), 115 Fed. 845; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 298; *The Ocean Spray* (D. C. Cal.), 117 Fed. 971; *Re Starin* (D. C. N. Y.), 124 Fed. 401; *The City of Boston* (D. C. Mass.), 159 Fed. 257; *The Hoffmans* (D. C. N. Y.), 171 Fed. 455; *Re P. Sanford Ross* (D. C. N. Y.), 196 Fed. 921; *The Victor* (D. C. N. Y.), 1 F. Supp. 931. It has been so decided by

this court in *Strong v. Holmes* (C. C. A. 9), 238 Fed. 554. Also, it has been held that the admiralty court after a decree fixing the responsibility for the injury may entertain a petition for the limitation of the liability of the owner to the value of the vessel, etc., although the owner had not theretofore raised the question in the admiralty court. *The Benefactor*, 103 U. S. 239; *The Monongahela River Consol. Coal and Coke Co. v. Hurst*, 200 Fed. 711; *The Defender*, 214 Fed. 316; *The Ethelstan*, 246 Fed. 187. It appears from these cases that the proceeding to limit the owner's liability is separate and distinct from the common law remedy, or the question of liability in admiralty.

"Appellee claims that these cases are not authority upon the proposition involved here by reason of the fact that the question of whether or not the judgment of the common law court was res adjudicata as to the amount of the claim was not raised in those cases. If not specifically raised, it was necessarily and obviously involved and these decisions must be taken as authority for the proposition that the judgment of the common law court fixing the amount of the damage and the responsibility of the owner therefor is not res adjudicata as to the right of the owner to limit his liability in the subsequent proceeding in an admiralty court, where the question was not raised in the common law action.

* * *

"We conclude that the judgment of the Superior Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. * * *

" * * * there is nothing in the decisions of the Supreme Court in *Langnes v. Green*, supra, or *Ex Parte Green*, supra, inconsistent with the right of

the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary * * * this is the purport and effect of those decisions. The decisions of the Supreme Court in *Langnes v. Green* and *Ex Parte Green* are in full accord with the earlier decisions holding that the question of the owner's right to limit his liability was not prejudiced by a judgment at law or a decree in admiralty fixing the amount of the claimant's recovery, if the right to limit liability was not theretofore presented. See also, *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932; and, *The Kearny*, 1933 A. M. C. 705."

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

It is claimed by petitioner that the decision sought to be reviewed is probably in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Putnam*, 55 F. (2d) 73 (1932), and in conflict with applicable decisions of this court.

There is in the opinion of respondent no conflict between the decision here sought to be reviewed and that in *In re Putnam*, 55 F. (2d) 73, nor is the decision in conflict with applicable decisions of this court.

ARGUMENT

We will first refer to the applicable statutes and admiralty rules.

STATUTES

Title 46 U. S. C. A., so far as material, provides as follows:

§183. "The liability of the owner of any vessel, for any * * * act, matter, or thing, loss, damage, * * * done, occasioned, or incurred without the

privity, or knowledge of such owner * * * shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

§185. "It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability * * * if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee * * *; from and after which transfer all claims and proceedings against the owner shall cease."

§186. "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense * * * shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels. * * *."

ADMIRALTY RULES

The Admiralty Rules, so far as material, provide as follows:

No. 51. "When any * * * owner * * * shall desire to claim the benefit of limitation of liability * * * said owner * * * shall and may file a libel or petition in the proper District Court of the United States * * * setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner * * * in such * * * vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation * * * for the payment thereof into court * * * or, if the said owner * * * shall so elect, the said court shall without such appraisement make an order for the transfer * * * of his * * * interest in such vessel and freight to a trustee * * *; and, upon

compliance with such order, the said court shall issue a monition against all persons claiming damages * * * citing them to appear * * * and file their respective claims * * * and the said court shall also, on the application of the said owner * * * make an order to restrain the further prosecution of all and any suit or suits against said owner * * * ."

No. 52. " * * * the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said * * * vessel and freight * * * shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims * * * saving, however, to all parties any priority to which they may be legally entitled."

No. 53. "In the proceedings aforesaid, the said owner * * * shall be at liberty to contest his * * * liability, or the liability of said * * * vessel * * * (independently of the limitation of liability claimed under said act) * * * and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner * * * of said * * * vessel, either to an exemption from liability, or to a limitation of liability * * * or both, provided such answer shall * * * state the facts * * * by reason of which liability is claimed or right to limitation of liability should be denied."

No. 54. "The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said * * * vessel may be libeled * * * or, if the said * * * vessel be not libeled, then in the District Court for any district in which the said owner * * * may be sued in that behalf * * * ."

It has been many times asserted by this court that the statutory provisions for limitation of a shipowner's liability are to be given a liberal construction.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 588, 27 L. ed. 1038 (1883), this court said:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

See also:

Butler v. Boston Steamship Co., 130 U. S. 527, 549, 550, 32 L. ed. 1017 (1889);

LaBourgogne, 210 U. S. 95, 121, 52 L. ed. 973 (1908);

Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 63 L. ed. 631 (1919);

Evansville & B. G. Packet Co. v. Chero Cola Bottling Co., 271 U. S. 19, 21, 70 L. ed. 805 (1926);

Hartford Acci. & Indemnity Co. v. Southern P. Co., 273 U. S. 207, 214, 71 L. ed. 612 (1927).

THE SHIPOWNER MAY LIMIT LIABILITY AS AGAINST A SINGLE CLAIM

It has long been settled that there may be limitation of liability in the federal court where there is but a single claimant. *Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110 (1911); *White v. Island Transp. Co.*, 233 U. S. 346, 351, 352, 58 L. ed. 993 (1914).

In the *Matter of the Petition of East River Towing Co.*, 266 U. S. 355, 365, 368, 69 L. ed. 324 (1924), a single claimant brought suit in the state court and a petition for limitation of liability was filed in the federal court. The following question was certified to this court:

> "If an action at law be brought such as is described in Merchant Marine Act 1920, §33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?"

to which the answer was "Yes."

See also:

Flink v. Paladini, 279 U. S. 59, 73 L. ed. 613 (1929).

PROCEDURE TO OBTAIN LIMITATION OF LIABILITY

In *Benedict on Admiralty*, 5th Ed., Vol. 1, p. 576, §484, is found a discussion of the appropriate proceedings which may be taken to obtain limitation of liability. We quote as follows:

> "In *The H. F. Dimock* (52 Fed. 598), the court points out four ways in which the statute may be availed of, viz., (1) by the simple answer of the ship owner when sued; (2) by his libel or petition, offering a transfer of the ship to a trustee appointed by the court under Revised Statutes §4285; (3) by a

similar libel or petition, offering, instead of a transfer of the ship, a stipulation, under General Admiralty Rule 51 (formerly 54) promulgated by the Supreme Court, to pay her value as appraised under the order of the court, or a deposit in court of the amount of such appraised value, and (4) by a creditor's suit for an apportionment and *pro rata* distribution. * * * The above methods are not necessarily exclusive. The Supreme Court has said that the rules 'were intended to *facilitate* the proceedings of owners of vessels for claiming the limitation of liability secured by the statute.' (*The Benefactor*, 103 U. S. 239, 244, 26 L. ed. 351; *The Scotland*, 105 U. S. 24, 33, 26 L. ed. 1001), and if at any time it should appear that some proceeding not provided for by the rules was more appropriate for securing the result, it can hardly be doubted that such a proceeding would be sustained, and as to all details of procedure not specifically provided for by rule, their appropriateness to secure the result aimed at furnishes a criterion."

LIMITATION OF LIABILITY MAY BE HAD AFTER TRIAL ON MERITS

We will discuss the authorities dealing with the identical or substantially identical facts as in the case at bar, starting with the earlier cases.

In *The Benefactor*, 103 U. S. 239, 242, 26 L. ed. 351 (1880), a collision occurred between the schooner "Susan Wright" and the Steamship "Benefactor," which resulted in the sinking of the former with a total loss of vessel and cargo. A libel was filed against the steamer at the suit of the owners of the schooner for the loss of their vessel and a libel at the suit of the crew for the loss of their personal effects and, pending the proceedings on these libels, a petition of intervention was filed by the

owners of the schooner's cargo to recover the value of the same. The owner of the steamship "Benefactor" filed a claim and stipulation in the value of the steamer for her release and answer denying all liability. A decree was entered in favor of the libelants and intervenors assessing damages, from which an appeal was taken to the circuit court.

Thereafter the owner of the steamship filed in the district court a petition for limitation of liability and applied for an order restraining the further prosecution of the action, which restraining order was denied, and on exceptions to the petition the same was dismissed, which order of dismissal was affirmed on appeal to the circuit court. In reversing the order of dismissal, this court said:

> "The gound of dismissal relied on by the district judge (which was adopted by the circuit court) was that the petition came too late, inasmuch as it was not filed until after a trial of the cause of collision upon its merits and a final decree thereon. The judge referred to the fifty-sixth admiralty rule, which declares that in proceedings to obtain a decree for a limited liability, the owners may contest all liability on their part or that of their vessel, as well as claim a limitation of liability under the statute; provided, that in their libel or petition they shall state the facts and circumstances by reason of which exemption from liability is claimed. He supposes that this right to contest the case on the merits at the same time and in the same proceedings that a limited liability is claimed, implies that such proceedings must be instituted before the case has been tried on its merits; because a second trial of the same matter, after it has once been adjudicated, will not be deemed to have been contemplated by the rule. In supposing that a second trial of the merits, between the same parties, was not contemplated by the rule, the judge

was correct. But it was certainly not the intention of the admiralty rules to preclude a party from claiming the benefit of a limited liability after a trial of the cause of collision. * * * .

"But since the statute is imperative, that where a loss occurs in a vessel by embezzlement or by collision or other thing, without the privity or knowledge of the owner, his liability 'shall in no case exceed the amount or value of his interest in the vessel and her freight then pending,' it would be a questionable exercise, by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all. Such was not the intention of the rules adopted in 1872. Admiralty Rules, 54-57. They were intended to facilitate the proceedings of the owners of vessels for claiming the limitation of liability secured by the statute without regard to the time when such proceedings might be commenced, or whether before or after the general liability should be fixed. To require such proceedings to be commenced before a trial of the cause of collision would in many cases work injustice. In addition to the reasons already adverted to, it may be added that the owners of the vessel found in fault may often not know the amount of damage and loss sustained by the other vessel and her cargo. It may greatly exceed their expectations, and, contrary to what was originally known or supposed, may turn out to be much greater than the value of their own vessel and the freight pending thereon. * * * .

"Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded so long as any damage or loss remains unpaid. * * * .

"The petition for relief in the present case was

justly liable to exception so far as it sought to retry the question of fault and general liability as between the petitioners and the parties in the libel suits. That question was determined by the decree made upon the libels which had been filed; which decreee could only be reviewed on appeal. But so far as the petition sought a limitation of the owners' liability to the value of the ship and freight, it was free from objection and ought to have been sustained; and the libellants and intervenors ought to have been restrained, by order of the court, from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal, in any other manner than by the *pro rata* distribution of the fund standing by stipulation in place of the ship and freight."

The City of Norwich, 118 U. S. 468, 489, 30 L. ed. 134 (1886).

In the *S. A. McCaulley*, 99 Fed. 302, 304 (D. C. Pa. 1899), a petition for limitation of liability was filed against a *single claimant* after a judgment in the state court. Exceptions to the petition were filed, alleging that there was but one suit pending against the petitioners and as the supreme court of Pennsylvania had decided that the common pleas court could apply the law limiting the liability of the ship owners, the district court had no jurisdiction to entertain the petition. The court said:

"* * * as I look at the statutes and the decisions upon this subject, it is impossible to deny them the right to come into the federal tribunal, even after they have taken their chance of a favorable verdict in the common pleas. * * *

"* * * the statute fixes no limit of time within which the court must be asked to act, and the Supreme Court of the United States in *The Benefactor*, 103 U. S., on page 245, 26 L. ed. 351, has intimated that the right may exist as long as any damage or

> loss remains unpaid. The court says: 'Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded, so long as any damage or loss remains unpaid.' "

The exceptions were overruled on terms requiring the payment of costs. Cited in *White v. Island Transp. Co.*, 233, U. S. 346, 351, 58 L. ed. 993.

In *Re Old Dominion S. S. Co.*, 115 Fed. 845, 850 (D. C. N. C. 1902), a petition for limitation of liability was filed after judgment had been obtained against the petitioner in the state court, from which an appeal by the petitioner was pending, and an injunction against further proceedings was issued and limitation granted as to this claim and exemption as to another. The court, in referring to the petitioner, said:

> "It has the privilege of invoking the marine law at any time before a judgment is actually paid. (*The Benefactor*, 103 U. S. 239; 26 L. ed. 351; Ben. Adm. §659; Hughes, Adm., pp. 228, 229) * * * ."

In *Gleason v. Duffy*, 116 Fed. 298, 301 (C. C. A. 7, 1902), the owners of a vessel were sued in the state court for damages by reason of personal injuries sustained by a *single claimant*. The owners, by their answer, claimed the benefit of limitation of liability, to which plea a demurrer was sustained, and judgment against the owners was entered, which was affirmed on their appeal, on which appeal a supersedeas bond was given. (*Duffy v. Gleason* (Ind.), 58 N. E. 729). Thereafter the owners filed in the district court a petition for limitation of liability. It was objected that resort to the proceedings to

limit liability was not available after the rendition of the judgment at common law. The court, in denying this contention, said:

> "We think * * * that the question is set at rest by the decision in *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. * * * .
>
> "This decision seems to us conclusive of the question here. It is said that that case is distinguishable from the one in hand because there the proceeding was in admiralty in the district court, while the one here was a common-law remedy sought in a state court. We think the distinction is unavailing. Whether the remedy resorted to be one in admiralty or at common law, the right to limitation under the statute is the same; and, while the right to a common-law remedy is reserved, it is so reserved subject to the provisions of the statute which sanctions proceedings for the limitation of liability. The appeal taken by the owners in the state court was properly resorted to in contestation of their liability, and to correct any supposed errors of the trial court. They had legal right to do that, and should be no more concluded by the exercise of that right than by the defense of the case in the trial court. The bond which they gave upon appeal was one which the law required them to give in order that they might properly and safely present their contention to the appellate court. We do not think that that should preclude them from asserting their rights under the statutes of the United States."

In *The Ocean Spray*, 117 Fed. 971 (D. C. Cal., 1902), a petition for limitation of liability was filed after a *single claimant* had recovered a judgment in the state court, which was reversed on appeal and pending for new trial. Exemption from liability was granted on payment of the claimant's costs incurred in the state court proceedings.

In *Re Starin*, 124 Fed. 101, 102 (D. C. N. Y. 1903) a petition for limitation of liability was filed against a *single claimant* after judgment in the state court was affirmed on appeal. The court said:

> "The plaintiff in the former action and the claimant in this proceeding interposed the defenses: First, that by the proceedings in the state court the defendant waived the right to seek remedy here; * * * fourth, that the claimant was the only person injured, and that the court cannot exercise its jurisdiction, as the petitioner had a complete remedy in the state court.
>
> "It is concluded (1) that the judgment in the state court established that the defendant and his servants were negligent * * * and that the injury resulted from such negligence; (2) that the petitioner has not waived his right to limit his liability in this court * * * ."

In *The City of Boston*, 159 Fed. 257, 259 (D. C. Mass. 1906, reversed on other grounds in *Davenport v. Winnisimmet Co.*, 162 Fed. 862, and certiorari denied, 212 U. S. 574, 53 L. ed. 657), a petition for limitation of liability was filed after a verdict had been obtained against the petitioner in the state court on a *single claim*, against which a motion for new trial had been overruled, and while the allowance of its bill of exceptions was pending. Limitation was granted. The court said:

> "The Winnisimmet Company had without doubt ample time after the collision to file a petition for limitation of liability before Mrs. Davenport's suit against it came on for trial. It is true, as urged on her behalf, that allowing its petition to be filed here after the verdict in that suit is in effect allowing the company to take the chance of a verdict in the state court in its favor, but to hold in reserve at the same time the power to defeat an adverse verdict

by resorting to this court. It has been repeatedly held, however, that prior litigation of the question of his liability in the state courts will not deprive a vessel owner of the right to resort to an admiralty court for limitation of liability, however far the prior litigation may have proceeded. In *The S. A. McCaulley* (D. C.), 99 Fed. 302, there had been two years' litigation in the state court and a verdict against the petitioner. In *Re Old Dominion S. S. Co.* (D. C.), 115 Fed. 845, a judgment had been obtained against the petitioner. In *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100, there had been a judgment against the petitioners from which they had appealed, and the state appellate court had affirmed the judgment. In *The Ocean Spray* (D. C.), 117 Fed. 971, there had been an adverse judgment, an appeal by the petitioner, and the state appellate court had reversed the judgment and remanded the case for a new trial. In *Re Starin* (D. C.), 124 Fed. 101, there had been two successive appeals by the petitioner from a state court judgment against him, the final result whereof had been affirmance of the judgment. These decisions are all based upon the principles declared in *The Benefactor*, 103 U. S. 239, 26 L. ed. 157. In view of them and of the law as stated by the Supreme Court in that case, this petitioner cannot be regarded as having waived or lost its right to claim the benefit of the limited liability act, notwithstanding its delay in asserting its claim to that benefit here, and notwithstanding the contest it has maintained with regard to Mrs. Davenport's claim in the state court."

In *The Hoffmans*, 171 Fed. 455, 460 (D. C. N. Y. 1909), on a petition for limitation of liability filed against a *single claimant*, the court said:

> "Assuming that the owner of a vessel can invoke the remedy of the statute in a state court, it is evident that he can only do so effectively by way of defense to the claim or claims involved in a single suit. If

he desires to receive the general protection given by the statute, he cannot obtain it otherwise than by resorting to its terms and the rules provided thereunder and, in any event, he is not obliged to adopt that method of a defense. * * *.

"If there is more than one forum in which ship owners can obtain relief under the statute, it would seem that the right of selecting the court rests with them. If they wish to proceed in an affirmative manner, they cannot do so except in the District Courts and they must use their machinery to secure full protection. * * *.

"It is well settled that a shipowner can resort to the District Courts at any time before satisfaction of judgment, even after the claim or claims has been fully litigated in the state courts. *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. Notable instances of a final resort to the District Court for limitation, after proceedings in a state court, are: In *Re Starin*, and *The S. A. McCaulley*, supra. * * *."

Cited in *White v. Island Transp. Co.*, 233 U. S. 346, 352, 58 L. ed. 993.

In *Re P. Sanford Ross*, 196 Fed. 921, 923 (D. C. N. Y. 1912, reversed on other grounds, 204 Fed. 248), a petition for limitation of liability was filed against a *single claimant* after verdict in the state court. The court said:

"A vessel may be surrendered under the statute allowing limitation either before or after a verdict has been obtained settling the responsibility for the accident. *City of Boston* (D. C.), 159 Fed. 257; *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. If a verdict is recovered in an action in a state court or in a common-law action in a United States Court, and if a right to limit all liability to the value of the craft upon which the accident occurred is given by act of Congress, then the right of trial by jury may be enjoyed by the plaintiff; but the collection of damages may be confined to the value of the vessel on which the liability occurred.

"A proceeding to limit liability need not be affected by the form or the manner in which the liability is fixed. The statute of Congress was intended to and does allow a substitution of the res for the personal claim against the individual in certain kinds of cases, and no reason is shown why this should not apply to a cause of action in judgment as well as to a cause of action before trial.

"In the present instance the question is not whether the judgment can be avoided. That matter is res adjudicata, and the administratrix's right to her judgment has been established. But the case presents the question whether because of the place in which the accident occurred, and through prior lack of knowledge of the defective conditions, the owner of the vessel can avoid as great responsibility for the accident as would have rested upon him if the pile driver had been working upon staging attached to the shore."

In *Monongahela River Consol. Coal & Coke Co. v. Hurst*, 200 Fed. 711, 713 (C. C. A. 6, 1912), a petition for limitation of liability was filed after decrees had been entered on libels in personam and affirmed on appeals, in which appeals supersedeas bonds were given. These trial proceedings were urged as a bar to the proceedings to limit liability. The court said:

"Under admiralty rules Nos. 54 to 58 (29 Sup. Ct. xlv, xlvi), the benefit of the statute can be had under libel filed by the owner in a District Court, appraisement of such owner's interest in the vessel and pending freight, and the bringing of the amount of such appraisal into court, by either (a) actual payment into court; or (b) giving stipulation for such payment when ordered; or (c) the transfer by libelant of his interest in the vessel and freight to a trustee appointed by the court, as provided by section 4285 (U. S. Comp. St. 1901, p. 2944).

"The proceeding to limit liability will not affect the status of the appellees' decrees in the collision suits. Those decrees are final adjudications, both as to liability and amount of damages. *Norwich Co. v. Wright*, 13 Wall. 104, 122, 20 L. ed. 585; *The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *The Scotland*, 105 U. S. 24, 36, 26 L. ed. 1001; *Providence, etc., S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 301, 54 C. C. A. 100. But if appellants' liability shall be limited, only a small portion of appellees' decrees can in fact be paid.

" * * *

" * * *. While it is true that appellants had the right to take the benefit of the limitation of liability directly in the collision suits (*The Scotland*, supra, 105 U. S. 31, 26 L. ed. 1001; *The Great Western*, 118 U. S. 520, 525, 526, 6 Sup. Ct. 1172, 30 L. ed. 156), they were not bound to do so. They had the right to first contest liability for the collision in any court, state or federal, in which action therefor might be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute. *The Benefactor*, supra, 103 U. S. 244, 26 L. ed. 351; *The City of Norwich*, 118 U. S. 468, 489, 6 Sup. Ct. 1150, 30 L. ed. 134; *The San Pedro*, 223 U. S. 365, 372, 32 Sup. Ct. 275, 56 L. ed. 473; *Gleason v. Duffy*, supra, 116 Fed. 298, 301, 54 C. C. A. 100. * * *."

"The question, however, of the effect of giving the supersedeas bond presents more difficulty.

"The contention that they thereby elected to substitute the responsibility of the surety on the supersedeas bond for the security of the vessel and its freight, and so waived the benefit of the limitation statute, is plausible. But does this view give full effect to the language of the statute and to its intention as construed by the courts? We are con-

strained to believe it does not. The purpose of the statute was to encourage shipbuilding and to bring our system of admiralty, in respect to personal liability, into harmony with the general maritime law of modern Europe. *Norwich Co. v. Wright*, 13 Wall, 104, 116, 20 L. ed. 585; *Butler v. S. S. Co.*, supra; *The City of Norwich*, 118 U. S. 468, 490, 6 Sup. Ct. 1150, 1155 (30 L. ed. 134). * * *.

"The construction of this statute has been uniformly liberal. In the case of *The Benefactor*, Justice Bradley said (103 U. S. 244, 26 L. ed. 351):

" 'But since *the statute is imperative* that where a loss occurs in a vessel, by embezzlement or by collision or other thing, without the privity or knowledge of the owner, his liability 'shall *in no case* exceed the amount or value of his interest in the vessel and her freight then pending,' it would be a questionable exercise, by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all.'

" * * *.

"In Hughes on Admiralty, §172, it is said:

" 'The owner may take advantage of the statute at any time before he is actually compelled to pay the money. Under the American practice he may contest his liability for any damages at all, fight that through all the courts, and, if finally defeated, take advantage of the statute.'

"In Benedict on Admiralty (4th Ed.), §520, the author says:

" 'There seems to be no limit of time, the expiration of which will cut off the owner of the vessel from taking advantage of the provisions of the statute. * * * He may wait until he is sued, and defend the case, and appeal from an adverse verdict, and, after

affirmance by the appellate court, still file his libel for limitation of his liability.'

" * * *

"It was the evident purpose of the limitation statute to make the liability of an owner or charterer, when not personally in fault, precisely the same, whether suit is brought in personam or in rem. The view that the giving of the supersedeas bond, and the consequent stay of execution necessary to the complete preservation of appellants' rights pending appeal, did not constitute a waiver of the then existing right to limit liability, if and when such liability should be established, is, we think, more consonant with the language and spirit of the statute, and more in harmony with the decisions thereunder, than is the contrary view. The record does not indicate that appellants intended to abandon the benefit of the statute, should occasion arise for invoking it. The only substantial advantage which appellants gained through the supersedeas was a postponement of the time when resort to the limitation statute must be had; and the only injury suffered by appellees is through such delay as may have resulted in ultimately realizing the amount apportionable to their decrees. Had appellants prevailed on the appeal to this court in the collision suits, such resort might never have been necessary, and the right to such postponement of limitation proceedings until after the fixing of liability is, as has already been said, well settled. Thus, through the supersedeas bond, appellants have practically preserved only the right which the statute was intended to give them, and a right which could have been preserved (without a surrender of the vessel) by giving (instead of a supersedeas bond) a stipulation under the limitation procedure for payment of the appraised value of vessels and freight into court when ordered. We think it the better view that the obligation of the surety was only coextensive with that of the principal, that the liability incurred under the

supersedeas bond was impliedly subject to the enforcement of the limited liability statute, and would be itself superseded, at least pro tanto, by the decree limiting such liability. We see no merit in the proposition that the surety can be held to full liability, notwithstanding the discharge of the principal. Decisions based upon the express provisions of the bankruptcy act are not in point.

"It follows from this view that the plea in bar to the petition to limit liability should not have been sustained. * * *."

In *The Defender*, 214 Fed. 316, 317 (D. C. Wash. 1914), it was held that a petition for limitation of liability apparently against a *single claimant*, did not come too late, although filed after a finding of liability in an action in rem in admiralty. The court said:

"Petitioner offers to surrender the Defender to a trustee for the benefit of libelant and others entitled to share therein, and prays discharge from all liability. Libelant excepts because of claimant's laches and the insufficiency of the foregoing allegations. * * *. Petitioner cites the following cases: *New York & W. S. S. Co. v. Mount*, 103 U. S. 239, 26 L. ed. 351; *The City of Boston* (D. C.), 159 Fed. 257; *In re Starin* (D. C.), 124 Fed. 101; *Dyer v. Nat. Steam Nav.*, Fed Cas. No. 4, 225; *The Benefactor*, 102 U. S. 214, 26 L. ed. 157; *Benedict on Admiralty* (4th Ed.), p. 349. The exception because of claimant's laches is overruled. *Benedict on Admiralty*, §522."

In *The T. W. Wellington*, 235 Fed. 728, 729 (D. C. N. Y. 1916), a petition for limitation of liability was filed against a *single claimant* after judgment in the state court and appeal therefrom, on which a bond was given to stay execution. The court said:

"The boat may be surrendered while liability is contested, and a bond given as security for carrying on litigation. *The Benefactor*, supra. A judgment may

have been obtained before hearing of or application for the limitation, and the court may prevent the parties from attempting by execution or otherwise to collect any moneys recovered by them beyond the amount awarded in the said proceedings. *The Benefactor*, 103 U. S. 244, 26 L. ed. 351; In *Re P. Sanford Ross* (D. C.), 196 Fed. 921 (reversed on other grounds, 204 Fed. 248, 122 C. C .A. 516); *The Capt. Jack* (D. C.), 169 Fed. 456.

"In *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100, the Circuit Court of Appeals agreed with the court below, which held that the petitioner, Gleason, could have a decree restraining a judgment creditor, Duffy, from collecting his judgment and from prosecuting the suit upon the appeal bond. The surety was not before the court, but the action against the surety was brought to the court's attention. The Circuit Court of Appeals said that the proceeding could be instituted after the 'rendition of a judgment at common law,' but should be 'seasonably instituted,' so as to allow proper determination of the 'extent' of liability, citing *Transportation Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585. It therefore made a condition of the limitation payment of costs in the trial court and on appeal in the damage action."

In *Strong v. Holmes*, 238 Fed. 554, 556 (C. C. A. 9, 1916), a *single claimant* sustained personal injuries and a judgment for damages was obtained in the Superior Court of the State of Washington for King County, and thereafter a second judgment was obtained thereon in the district court of Alaska and execution threatened thereon. A petition for limitation of liability was thereupon filed. In reversing the decision below dismissing the petition for limitation of liability, the court among others stated:

"It is suggested that the libel or petition was not

filed in time; but we think otherwise. *The Benefactor*, 103 U, S. 239, 26 L. ed. 351.

"It is also urged that there is only one claimant * * * but the fact that there is but one claim is immaterial. *White v. Island Transportation Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993. * * *."

In *Societe Naphthes Transports v. Bisso Towboat Co.*, 241 Fed. 463, 465 (C. C. A. 5, 1917, certiorari denied, 245 U. S. 652, 62 L. ed. 532), the court said:

"Sections 4284, 4285 and 4286 (Comp. St. 1916, §§8022-8024), relate to procedure under Section 4283.

"It seems to be settled that proceedings to limit the liability of shipowners under said section supersede all other actions and suits for the same loss or damage in the state and federal courts. See *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 27 L. ed. 1038; also *Monongahela River Consolidated Coal & Coke Co. v. Hurst*, 200 F. 711, 119 C. C. A. 127. In this last cited case it is held that the right of a vessel owner to a limitation of liability under the statute as against a decree for collision damages is not waived by the giving of a supersedeas bond or appeal from such decree, but the liability of both principal and surety on such bond is impliedly subject to such limitation, citing *The Scotland*, 105 U. S. 31, 26 L. ed. 1001, and *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. ed. 156, et seq; and in that case it was further held that the shipowner had the right to first contest liability for the collision in any court, state or federal, in which suit therefor might be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute, and numerous cases are cited in support thereof."

In *The Ethelstan*, 246 Fed. 187, 188 (D. C. Fla. 1917), exceptions were overruled to a petition for limitation of

liability filed after a decree in rem had been entered on a *single claim*. The court said:

> "I have not only examined the authorities referred to in the briefs of proctors, but also the authorities referred to in the note to the section in the Federal Statutes Annotated, Vol. 4, page 839, et seq. and I am of opinion that the right secured to the ship-owner by the section is not waived by failure to assert it before decree is entered."

In *The Victor*, 1 F. Supp. 931 (D. C. N. Y. 1927), a petition for limitation of liability was filed against a *single claimant* after a judgment in the state court, from which an appeal was taken and a supersedeas bond posted and the judgment affirmed. The court said:

> "The right of the owner of the vessel, the petitioner, to maintain proceedings for limitation of liability after the recovery of judgment on the claim against which limitation is sought cannot be denied, and that is also true even after the appeal was taken and the supersedeas bond was given, but, in addition to surrendering the vessel or giving bond for its value, under the facts stated, the petitioner must pay interest on the value of the vessel from the date of judgment; the costs of the trial and the appeal. *The T. W. Wellington* (D. C.), 235 F. 728; *Monongahela River Consol. Coal & Coke Co. v. Hurst* (C. C. A.), 200 F. 711; *Gleason v. Duffy* (C. C. A.), 116 F. 298."

THE DECISIONS IN LANGNES V. GREEN, 282 U. S. 531, 75 L. ED. 520 (1931), AND EX PARTE GREEN, 286 U. S. 437, 76 L. ED. 1212 (1932)

The petitioner relies upon these two cases herein referred to as the *Langnes* case as changing the law as settled in the foregoing authorities. The facts in the

Langnes case were as follows: Green brought an action against Langnes in the state court to recover damages for personal injuries suffered while employed upon the "Aloha," a fishing vessel owned by Langnes. While this action was pending, and two days before the date set for trial, Langnes filed a petition for limitation of liability in the federal district court and secured an order restraining the further prosecution of the state court action. It was stipulated by the parties that the vessel was of no greater value than the sum of $5,000. Green filed his claim in the limitation proceedings and thereupon moved to dissolve the restraining order. The district court denied the motion and tried the cause in respect of Green's claim, holding there was no liability and entering a decree accordingly. On appeal to the Circuit Court of Appeals, the decree was reversed on the ground that the district court was without jurisdiction and this court heard the cause on a writ of certiorari and in reversing both courts stated in part as follows (*Langnes v. Green*, supra, p. 539):

> "Section 24 (3) of the Judicial Code (U. S. C. title 28, §41 (3)) confers upon the district courts of the United States admiralty and maritime jurisdiction, 'saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it.' The provisions of the statute in respect of limitation of liability confer upon the owner of a vessel in a variety of cases, including the present case, when loss is occasioned without the privity or knowledge of the owner, the right to limit his liability to the value of his interest in the vessel and her freight then pending. That the action brought in the state court was authorized by the first of the statutes referred to is plain. That the

petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear. *White v. Island Transp. Co.*, 233 U. S., p. 351, 58 L. ed. 996, 34 S. Ct. 589, supra. The situation, then, is that one statute gave respondent the right to a common-law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal district court. Needless to say that if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

" * * * this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (§4283, U. S. C. title 46, §183) may be obtained by proper pleading. * * *

"Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. * * *. Notwithstanding this, however, the shipowner was free to invoke the jurisdiction of the federal district court (*White v. Island Transp. Co.* 233 U. S. 346, 58 L. ed. 993, 34 S. Ct. 589, supra); and, that having been done, the question which arose was not one of jurisdiction, but, as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause.

"The term 'discretion' denotes the absence of a hard and fast rule. *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. ed. 1027, 1033, 22 S. Ct. 731. When invoked as a guide to judicial action it means a sound dis-

cretion, that it to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

"In the case now under review the problem presented to the district court by the motion of respondent was quite simple. Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner. The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common-law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the district court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

Following the subsequent remission of the cause to the state court, pursuant to this decision, Green put in issue

the right of Langnes to limited liability by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was then properly brought before the district court and that court held that, the question of Langnes' right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. 56 F. (2d) 647. A motion for leave to file a petition for mandamus against the district court to show cause why a writ should not issue requiring the judge thereof to conform to the opinion in *Langnes v. Green*, supra, was denied, in *Ex Parte Green*, supra, p. 438, the court stating:

> "We reversed the decrees of both courts, and remanded the cause to the district court for further proceedings. We held that the action was properly brought in the state court under §24 (3) of the Judicial Code, U. S. C. title 28, §41 (3), which saves to suitors in all cases of admiralty 'the right of a common-law remedy where the common law is competent to give it,' and that the petition for a limitation of liability also was properly brought in the federal district court. The situation then being that one statute afforded the right to a common law remedy, and another the right to seek a limitation of liability, we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the state court to proceed, or to retain complete jurisdiction; and, upon consideration of the matter, we held that such discretion should have been exercised so as to permit the state court to proceed.
>
> "But we also said that the district court, as a matter of precaution, should retain the petition for a limitation of liability 'to be dealt with in the possible but (since it must be assumed that respondent's

motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty.'

" * * *

"It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.

"Notwithstanding the foregoing, Green, following the remission of the cause to the state court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the federal district court, and that court held that the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. In this the district court was right, and the motion for leave to file the petition for writ of mandamus must be denied."

It is nowhere intimated in the *Langnes* case that this court was purporting to overrule the long line of authorities herein cited permitting limitation of liability after judgment or decree. There is nothing in the *Langnes* case indicating that this court had any intention of holding that in the case of a single claim the ship owner must, if sued in the state court, then and there seek limitation of liability.

The *Langnes* case only involved the proper exercise of

discretion under the peculiar circumstances there presented, the right to limitation of liability and the value of the vessel being admitted, to afford to the plaintiff in the state court "the right to a common-law remedy." That the *Langnes* case is so limited is illustrated by subsequent reference thereto in the following cases:

Kansas City S. R. Co. v. United States, 282 U. S. 760, 763, 75 L. ed. 684 (1931);

Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 420, 76 L. ed. 837 (1932);

Burns v. United States, 287 U. S. 216, 223, 77 L. ed. 266 (1932);

Rogers v. Guaranty Trust Co., 288 U. S. 123, 131, 77 L. ed. 652 (1933);

Western Union Telegraph Co. v. Tompa, 51 F. (2d) 1032, 1034 (C. C. A. 2, 1931);

Wittig v. Canada S. S. Line, 59 F. (2d) 428, 430 (D. C. N. Y. 1932);

Southern Pacific Co. v. Klinge, 65 F. (2d) 85, 87 (C. C. A. 10, 1933);

Great North Woods Club v. Raymond, 54 F. (2d) 1017, 1018 (C. C. A. 6, 1931), in which latter case the court said:

"* * * the *Langnes* case, at page 541 of 282 U. S. 51 S. Ct. 243, 247, points out that the discretion in this respect must not be so exercised as to prevent each suitor from pursuing, in state or in federal court, the right of action which state or federal laws give to him in that court."

In the *Langnes* case the state court suit was pending undetermined when the petition for limitation was filed and all language used by the court must necessarily be considered in reference to the facts there presented, namely, a plaintiff seeking a common law remedy in the

state court and the shipowner at the same time desiring to obtain limitation of liability, and it then appearing that there was but a single claim. The *Langnes* case balances the respective rights of the parties in that situation and upon the record there presented. In the case here the petitioner has had his common law remedy in the state court and no balancing of convenience or exercise of discretion is presented. The case has now assumed such form in the state court that only a court of admiralty is competent to afford respondent relief. There is no conflict between the decision here sought to be reviewed and the *Langnes* case.

As above stated, it is claimed that the decision sought to be reviewed is in conflict with *In re Putnam*, 55 F. (2d) 73 (C. C. A. 2, 1932). In that case Christie, as administratrix of the estate of one dying as the result of injuries on a yacht belonging to Putnam, made claim against Putnam for an amount in excess of the value of the yacht. Putnam thereupon filed a petition for limitation of liability in the federal district court and obtained an injunction against all actions. Christie filed a claim and moved to vacate the injunction; this being denied an appeal was taken to the Circuit Court of Appeals and that court, in holding that the injunction should be vacated, said:

> "*Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, modified what had theretofore been supposed to be the effect of *White v. Island Transportation Co.*, 233 U. S. 346, 34 S. Ct. 589, 58 L. ed. 993, by holding that, while a petition for limitation might be filed against a single claim and held in terrorem, ordinarily no injunction would go to prevent an action elsewhere. * * *. The single claimant

had there already commenced an action, and this is the only ground for distinguishing the case at bar. Both District Judges thought this difference critical, adopting the view that limitation proceedings were in rem, and that the case was an instance of the familiar doctrine that the jurisdiction of the earlier court in a suit involving custody over a res is exclusive. The only question for us is whether this is correct.

"We think that it is not. * * *."

There, as in the *Langnes* case, the claimant was seeking to obtain a common law remedy in the state court and the decision merely permits this by vacating the injunction.

Subsequent to the decision in *In re Putnam*, 55 F. (2d) 73, the identical case here presented was passed on by Campbell, D. J., in *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932 (D. C. N. Y. 1932), the court saying:

"This is a motion in a proceeding for limitation of liability, made by a successful claimant in a personal injury action against the petitioner, for an order dismissing the petition and vacating the injunction.

"The claimant brought an action under the Jones Act (Section 33 (46 U. S. C. A. §688)) in the state court, and recovered a judgment for $6,152, damages and costs.

"No issue of the right of the petitioner to limit liability was tendered or decided in the state court, and the petitioner lost no rights thereby.

"While under *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, the state court is competent to entertain a claim of the shipowner for limitation of liability, and to afford him appropriate relief, the shipowner was not bound to seek that relief in the state court, but was free to invoke the jurisdiction of this court. In other words, where

there is but a single claim on which the claimant can choose his own forum to try the issue of liability, the shipowner can choose his own forum to try the issue of his right to limit that liability.

"This court has jurisdiction, and should entertain a petition to limit liability after a trial of the issues of liability, and to restrain further proceedings in the common-law court, or execution on the judgment or decree obtained. *The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *The Victor* (D. C.), 1 F. Supp. 931, 1927 A. M. C. 1121; *In re Starin* (D. C.), 124 F. 101; *The T. W. Wellington* (D. C.), 235 F. 728.

"No laches has been shown, as the shipowner was not required to claim limitation until a liability on its part was established.

"The judgment in the state court, of course, establishes the amount of the claimant's damage, but does not determine the issue of the shipowner's right to limit, and no authority is cited, nor that I have found, which required the shipowner to litigate his right to limitation of liability in the state court.

"Motion denied."

See also: *The Kearny*, 3 F. Supp. 718, 720 (D. C. N. Y. 1933), where the court, in passing upon a motion to dissolve a restraining order, issued by the court in proceedings to limit liability, said:

"The question whether the injunction should be dissolved or modified rests upon the 'exercise of a sound discretion' of the court. *Langnes v. Green*, supra."

and discusses various questions of procedure.

It is submitted that where as here the petitioner has had the benefit of a jury trial on his claim, there is nothing to now prevent the federal district court entertaining respondent's petition for limitation of liability and proceeding thereon in the ordinary course of admiralty

procedure. Any other decision would deprive respondent of its statutory right to limitation of liability.

THE STATE COURT JUDGMENT IS NOT *RES JUDICATA* OF RESPONDENT'S RIGHT TO LIMITATION OF LIABILITY

We next consider the suggestion of the petitioner that the judgment in the state court is *res judicata* of the respondent's right to limitation of liability. This, of course, is predicated on the erroneous assumption that the respondent was required to seek the benefits of the limited liability act by defense in the state court. As the quotation from *Benedict on Admiralty*, supra, p. 10, discloses, and as the cases heretofore cited hold, the obtaining of limitation of liability by pleading the same in defense is only one of several alternatives open to the shipowner. It further ignores the authorities hereinabove cited to the contrary, and no authority in support of the proposition is referred to.

Petitioner asserts that "if the respondent could have claimed its right to a limited liability in the state court but failed to do so, that issue is now clearly *res judicata* (Pet. 11)." This assertion assumed a situation which is not here presented, namely, that if respondent had claimed a limitation of liability in the state court the petitioner would have confessed the right to limitation, as otherwise the state court would have had no jurisdiction to determine respondent's right to limitation of liability. *Ex Parte Green*, 286 U. S. 437, 76 L. ed. 1212.

The jurisdiction of the state court over the respondent's right to a limitation of liability was dependent both on

the respondent submitting the same to the state court and the petitioner confessing the right to limitation. Under these circumstances it is difficult to understand how the petitioner rightfully contends that the respondent "could have claimed its right to a limited liability." As stated by the Circuit Court of Appeals in the decision now sought to be reviewed, where as here the jurisdiction of the state court to pass upon the question of the limitation of liability, was not fixed by agreement as to value and right to limitation, as in the *Langnes* case, that court had no jurisdiction of the issue now presented and the respondent was under no duty to set up its right to limitation in that court. *Ash Sheep Co. v. United States*, 252 U. S. 159, 170, 64 L. ed. 507 (1920).

But even assuming that the respondent could have obtained the appropriate limitation of liability in the state court action, nevertheless it was not required to do so and the state court judgment is not *res judicata* of the issue as it was not presented or passed upon. This is conclusively demonstrated by the authorities hereinabove cited.

Petitioner asserts that a previous judgment is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. But as stated in the authority cited by petitioner for this proposition, and following his quotation therefrom (Pet. Br. 30):

> " * * * this rule bars only those matters which negative or are inconsistent with the facts which sustained the former judgment; and if the matters on which a second action is based, although they

might have been used as a defense in the first suit, constitute a substantive and distinct cause of action which defendant in the former suit was not bound to plead or set up, the former judgment is not a bar." 34 C. J. §1267, p. 858.

The right to a limitation of liability is an independent right given by federal statute in no way connected with the validity of claims against the shipowner. It is not a defense to petitioner's claim, but merely a limitation on the amount recoverable when execution is sought on the judgment. It is well settled by the authorities herein first mentioned that the judgment obtained prior to the petition for limitation of liability is only *res judicata* of the issue litigated, namely the validity of the claim and not of the right to limitation.

To the same effect in other situations are other cases decided by this court where it has been many times held that only issues covered by the pleadings and actually determined in the former suit are *res judicata*.

Hughes v. United States, 71 U. S. 232, 237, 18 L. ed. 203 (1866);

Packet Company v. Sickles, 72 U. S. 580, 592, 18 L. ed. 550 (1866);

Johnson Co. v. Wharton, 152 U. S. 252, 256, 38 L. ed. 429 (1894);

DeSollar v. Hanscome, 158 U. S. 216, 221, 39 L. ed. 956 (1895).

In *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. ed. 195 (1876), it was said:

"In considering the operation of this judgment, it should be borne in mind, * * * that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel

in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"*But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the

point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (Italics ours).

See:

McComb v. Frink, 149 U. S. 629, 641, 37 L. ed. 876 (1892);

United Shoe Machinery Corp. v. United States, 258 U. S. 451, 458, 459, 66 L. ed. 708 (1922);

United States v. Southern Pacific Co., 259 U. S. 214, 240, 66 L. ed. 907 (1922).

In *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 257, 54 L. ed. 179 (1909), it was said:

"If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. * * *. * * * there are some defenses which are necessarily negatived by the judgment,—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance * * *. But this court has pointed out a distinction between such defenses and those which, though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merchants' Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285, that the right to plead them as a defense 'is of modern growth and is merely a convenience that saves bringing another suit, not a necessity of the defense.' And showing how essentially they are independent of the plaintiff's demand, although they might be a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn, and subject to a jurisdiction that he otherwise might have denied and resisted."

In *Pierce v. National Bank of Commerce*, 268 Fed. 487, 496 (C. C. A. 8, 1920), the rule is announced as follows:

> "While the failure of a defendant to allege and prove facts purely defensive to an issue on trial between him and the plaintiff renders such matters res adjudicata after judgment, and estops him from again presenting them (1 Van Fleet on Former Adjudication, §198), yet, when defensive facts also constitute an affirmative cause of action against the plaintiff, the defendant has the option to interpose them as a defense, or to reserve them for an independent or cross action. If he refrains from presenting them as a defense, the judgment in the action against him does not bar nor adjudicate his affirmative cause of action upon them; and he is free subsequently to maintain it."

The following four decisions from this court cited in the petition at pages 11 and 12 do not support the contention here made by petitioner.

In *Grubb v. Public Utilities Commission*, 281 U. S. 470, 74 L. ed. 972 (1930), after a judgment by a state court upholding the validity of an order of the Public Utilities Commission it was attempted to relitigate the validity of the order in the federal court "upon one ground not brought to the attention of the state court" and in connection therewith the language quoted in petitioner's brief, page 3, was used to the effect that this could not be done and that the state court judgment upholding the validity of the order was conclusive as to all grounds of attack which might have been presented against the validity of the order.

In *Werlein v. New Orleans*, 177 U. S. 390, 399, 44 L. ed. 817 (1900), the city of New Orleans brought an action against Werlein to recover certain real property. One

n had previously obtained a judgment against the and had levied on the property in question, and the claiming the proposed levy and sale to be illegal arious grounds had unsuccessfully brought an action njoin the levy and sale. Werlein was the owner of the perty by mesne conveyances from the purchaser at sale. The city in the action against Werlein urged an tional ground of illegality that had not been asserted ne action against Klein. The judgment in the action nst Klein was held to be *res judicata*, the court saying:

"The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit."

like character is *United States v. California & O. d Co.*, 192 U. S. 355, 48 L. ed. 476 (1903):

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. 1069 (1927), a seaman having been injured filed a in admiralty setting up several acts of negligence in use of defective appliances resulting in a decree ing indemnity by way of damages and allowing ntenance and cure. Thereafter an action at law in the court was commenced for the same injury based negligent operation of the appliances and removed he federal court, the allegations of fact as to the in which the accident happened being substantially same as in the previous admiralty action. It was held his court, using the language quoted in petitioner's at page 33, that the plaintiff's claim for damages g "one and indivisible" and having been submitted

and passed upon in the admiralty action, the decree therein entered was *res judicata*.

In *United States v. Moser*, 266 U. S. 236, 69 L. ed. 262 (1924), it was held that where in an action by a retired naval officer against the Government for an installment of retirement pay the issue as to whether he occupied the status of an officer who had served during the Civil War was found in his favor, such judgment was binding on the Government in a subsequent action for another installment.

The following two cases further demonstrate that the judgment in the state court is not *res judicata* of the issue as to limitation of liability.

In *Friend v. Talcott*, 228 U. S. 27, 40, 57 L. ed. 718 (1913), a creditor objected to a composition in bankruptcy on the ground that his claim resulted from a sale on credit induced by a false statement. The composition was approved and the bankrupt discharged. Thereafter the creditor sued the bankrupt for damages suffered because of the deceit practiced in procuring the sale of the goods on credit. The bankrupt set up as *res judicata* the order arising from confirmation of the composition. In overruling this contention, the court said:

> "To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge, it needs but statement to demonstrate the difference of cause which necessarily obtains between determining, on the one hand, in favor of the bankrupt, whether he is entitled to a general discharge, and of

> deciding, on the other hand, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge."

In *North Carolina R. Co. v. Story*, 268 U. S. 288, 289, 291, 69 L. ed. 959, (1925), a judgment was obtained in the state court against a railroad company for an injury occurring while the road was under Federal control. Under section 206 (g) of the Transportation Act of 1920 it was provided in part as follows:

> "No execution of process * * * shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

This section was not pleaded in the action in which the judgment was obtained. Thereafter a second suit based on the first judgment was commenced in the state court. The company, by answer, set up Section 206 (g) above quoted. The plaintiff demurred upon the ground that the first judgment had become *res judicata*. The court rendered judgment for the plaintiff which was affirmed on appeal.

The company then brought an action in the state court based on Section 206 (g) to permanently enjoin execution on the judgment so obtained and the answer set up the second judgment as *res judicata*. The action of the lower court refusing to grant the permanent injunction was affirmed on appeal. This judgment of affirmance was reversed by this court, saying:

> "The supreme court based its decision on the facts admitted in the petition and answer. Its judgment was that the previous judgment as between the

parties was res judicata, estopped the company from resisting execution, and thereby deprived it of any right to either a temporary or permanent injunction. * * *.

"* * * it may be conceded that the first judgment against the company in favor of the administrator, however erroneous it was * * * not having been appealed from, was res judicata. Nor could section 206 (g) prevent the second judgment. It was not directed against judgments. It was intended to protect the property of the company, not by preventing a judgment, but by preventing an execution to satisfy a judgment * * *. The language of the statute assumes the existence of judgments against carriers for fault of the government management before the section comes into play * * *. * * *.

"It is well settled that the principle of res judicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the decree. * * *."

In reversing this cause this court necessarily held that Section 206 (g) was not a defense that the company was required to set up in the action in which the judgment was first obtained, but that the same could be taken advantage of thereafter upon judgment being obtained without the company being subjected to the contention that the matter was *res judicata*.

It is submitted that the petition for limitation of liability filed by the respondent is a different right, claim or demand than that litigated in the state court and that the bar of the state court judgment is limited to that which was actually litigated and determined, namely, the validity of petitioner's claim.

Petitioner refers to *Carlisle Packing Co. v. Sandanger*,

259 U. S. 255, 66 L. ed. 927 (1922), at page 34 of his brief in which case it was held that where the *privilege* of limitation of liability was not set up or claimed in the answer in a state court action, it could not be first presented upon a request for a charge to the jury. This is merely a statement of a well recognized principle that the issues upon which a case are to be tried must be framed by the pleadings and not by the charge to the jury. This case cannot rightfully be made authority for the proposition that a petition for limitation of liability filed after judgment comes too late.

Some concluding remarks are made by petitioner relative to hardships should the practice followed in this case be approved. It is submitted that where as here the seaman has been accorded a common law remedy on his claim, the owner, if he so desires, should be permitted to obtain a limitation of liability binding not only on the particular claimant, but on all others that might exist. As it is common for seamen's claims to be asserted at the very close of limitation periods, the only practical method by which an owner may secure full limitation of liability is by obtaining a federal court limitation. Such incidental expense, if any, which might have to be borne by the seaman having a judgment if he chooses to contest the limitation, would scarcely appear to be an adequate reason for depriving the ship owner of the statutory right.

To hold, as contended for by petitioner, that a ship owner *must* set up the right to limitation in a state court action, is to place upon the shipowner a burden not contemplated by the limitation statute and to restrict

rather than to give it a liberal construction. If a seaman be injured at the commencement of a voyage and institutes suit at law, under petitioner's contention the shipowner would be required to seek limitation in that action, and if concluded to judgment and paid, and thereafter on the same voyage other claims arose, the shipowner would have been deprived of the full limitation granted by the statute. Nor is the shipowner in a position to know whether there is any need for limitation of liability until it is first determined that the claim or claims presented are valid, nor the amount of the limitation fund until the voyage has terminated.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals here sought to be reviewed is correct and not in conflict either with the decisions of this court or of any other federal court, but on the contrary follows the law as first established by this court in *The Benefactor*, 103 U. S. 239, 26 L. ed. 351 (1880), and since followed by every court to which the question has been presented, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
CLAUDE E. WAKEFIELD,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 614.—October Term, 1933.

Chris Larsen, Petitioner,
vs.
Northland Transportation Company, Charterer of the American Motor Vessel "Norco".

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 2, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

For personal injuries negligently inflicted, petitioner Larsen sought judgment in the Superior Court, King County, Washington against respondent Transportation Company, alleged owner and operator of motor ship Norco. The complaint contained no reference to other claimants or creditors. The company made general denial; also set up contributory negligence and assumption of risk. It said nothing concerning any other creditor or claimant or desire to limit liability.

After verdict, September 22, 1932, judgment for $12,500 against the Company followed, October 1. It then petitioned the United States District Court for limitation of liability. The petition recited the circumstances leading to the judgment, prayed for an appraisement of the Company's interest as charterer and the pending freight, monition against all persons claiming damages, an appropriate decree.

Larsen moved to dismiss this petition because:—The facts alleged are not sufficient. "There is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and obtained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County." "The petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to claim and obtain the advantage and benefit of said statute."

The trial court sustained this motion and dismissed the petition; the Circuit Court of Appeals reversed. The cause is here by certiorari granted upon Larsen's application which set out the following specifications of error:—

Langnes v. *Green*, 282 U. S. 531 and *Ex Parte Green*, 286 U. S. 437, were misconstrued; it was wrongly held that the District Court sitting in admiralty has exclusive jurisdiction to determine all questions involved in a proceeding for the limitation of liability where there is only one claimant and only one owner, and where the owner's right to limit liability is not disputed. It was wrongly held that the state court had no jurisdiction to entertain the claim of the shipowner for limitation of liability where there is only one claimant and only one owner, and where the owner's right to limit liability was not disputed. Also, that in such cases, the shipowner was under no obligation to submit his claim to limited liability to the state court, and the judgment of the state court was not *res judicata* as to all issues which might have been submitted for its decision.

In substance the argument here presented for petitioner is this: Prior to *Langnes* v. *Green* and *Ex Parte Green*, decisions by inferior federal courts undoubtedly sustained the view that, while the State court might have determined the value of respondent's interest in vessel and pending freight and limited liability thereto, it was not obligatory upon it to claim such limitation there, and after judgment for damages the right remained to institute limitation proceedings in the federal court. But, those opinions have affirmed another view, and clearly establish that the State court had jurisdiction and was competent finally to consider all necessary facts and limit the liability. Consequently, after the adverse judgment respondent could not seek limitation elsewhere—it was bound to present the whole matter to the State court.

We think it true to say that before *Langnes* v. *Green* and *Ex Parte Green* the commonly approved doctrine permitted a shipowner even when there was only one claimant to seek limitation of liability in a federal court after judgment against him for damages by a State court. And, unless those cases are to the contrary, that rule must apply here. *White* v. *Island Transp. Co.*, 233 U. S. 346; *In re East River Co.*; 266 U. S. 355; *S. A. McCaulley*, 99 Fed. 302; *Re Old Dominion S. S. Co.*, 115 Fed. 845; *Gleason* v. *Duffy*, 116

Fed. 298; *The Ocean Spray*, 117 Fed. 971; *Re Starin*, 124 Fed. 101; *The City of Boston*, 159 Fed. 257; *The Hoffmans*, 171 Fed. 455; *Re P. Sanford Ross*, 196 Fed. 921; *Monongahela River Consol. Co.* v. *Hurst*, 200 Fed. 711; Hughes on Admiralty, Sec. 172; Benedict on Admiralty (4th Ed.) Sec. 520.

In *Langnes* v. *Green* the injured employe brought an action for damages in the State court. Pending that, the employer instituted proceedings in the federal court to limit liability. The injured man was the only claimant and cause existed for regarding the limitation proceeding as intended to defeat trial by jury. This Court held, in the circumstances, the federal court should not have enjoined the State court proceeding; but that it should have retained jurisdiction. When thereafter it appeared—*Ex parte Green* —that in the State court the injured party insisted on denying the owner's right to limitation, we said the Federal court properly enjoined further proceedings. Neither of these causes supports the suggestion that when sued for damages in a State court a shipowner must at his peril claim limitation of liability in that suit.

Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255, replying to alleged error because the trial court refused to charge as requested, said—

"Petitioner asked an instruction that Sec. 4283 of the Revised Statutes applied, and that under it the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. *The Lotta*, 150 Fed. 219, 222; *Delaware River Ferry Co.* v. *Amos*, 179 Fed. 756. Here the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury."

This lends no support to the view that, sued in a State court for damages, the shipowner must set up his claim for limitation; otherwise, it is waived.

Statutory provisions for limitation of liability should be construed liberally in order to effectuate their beneficent purposes. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, 549, 550; *LaBourgogne*, 210 U. S. 95, 121; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334; *Evansville & B. G. Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, 21; *Hartford Acc. & Indemnity Co.* v. *Southern*

Pacific Co., 273 U. S. 207, 214; *Flink* v. *Paladini*, 279 U. S. 59. This view does not harmonize with the suggestion that to obtain limitation a shipowner must initiate steps to that end before any liability has been made to appear. *The Benefactor*, 103 U. S. 239. While in certain circumstances the shipowner may ask limitation in the State court, he is not compelled so to do.

Here the shipowner recognized the judgment; said nothing against its validity. The proceedings in the two courts looked towards entirely different ends.

The established rule in this Court is that if in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former cause is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Bates* v. *Bodie*, 245 U. S. 520, 526; *United States* v. *Moser*, 266 U. S. 236, 241; *United States Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 458. "While a defendant must bring forward all purely defensive matter, he is not barred by a former judgment against him as to any matter which he was not bound to present and which was not in fact litigated. A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action." Freeman on Judgments, 5th Ed., Sec. 786.

The judgment of the Circuit Court of Appeals is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.